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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL.,
*Appellants,*

*vs.*

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

Appeal from the Supreme Court of the State of Arizona

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL.,
*Appellants,*

*vs.*

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

Appeal from the Supreme Court of the State of Nebraska

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL.,
*Appellants,*

*vs.*

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

## BRIEF FOR APPELLANTS

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## BRIEF FOR APPELLANTS

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### Preliminary Statement

This Court has granted appeals from decisions of the Supreme Courts of Arizona, Nebraska and North Caro-

lina, in each of which substantially similar state laws prohibiting any form of union-security arrangement or agreement were held not to contravene the federal Constitution. The principle issue in each case is whether the law in question deprives the respective appellants of any federally protected right, and hence must be stricken down as being in violation of the federal Constitution. Since the applicable legal principles are, for the most part, the same in each of the three cases, the respective appellants, with the consent of the respective appellees and with this Court's indulgence, have joined together to present their arguments in one major brief. It is hoped, thereby, that much duplication of argument and citation of authority can be avoided. In so far as any principle of law is applicable to one case only, that will be set forth separately in a separate portion of this brief, as will be a discussion of the respective prohibitory laws involved, together with their application to the particular facts in each case.

## Opinions Below

The opinion of the Supreme Court of the State of Arizona (No. 27, R. 111-132) is reported under the name of *American Federation of Labor, et al. v. American Sash & Door Company, et al.*, 67 Ariz. 20, 189 Pac. (2) 912.

The opinion of the Supreme Court of the State of Nebraska (No. 47, R. 52-78) is reported under the name of *Lincoln Federal Labor Union No. 19129, et al. v. Northwestern Iron and Metal Company, et al.*, 149 Neb. 507, 31 N. W. (2d) 477.

The opinion of the Supreme Court of the State of North Carolina (No. 34, 57-80) is reported under the name of *State v. Whitaker, et al.*, 228 N. C. 352, 45 S. E. (2d) 860.

## Jurisdiction—Arizona Case (No. 27)

The federal questions here presented were properly raised and preserved and were passed upon by the courts

below (No. 27, R. 37-46, 96, 110-111, 112-132). The judgment of the Supreme Court of Arizona was entered on February 4, 1948 (No. 27, R. 142). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended, 28 U.S.C.A. 344. On March 29, 1948, this Court noted probable jurisdiction (No. 27, R. 143).

## Jurisdiction—Nebraska Case (No. 47)

The federal questions here presented were properly raised and preserved and were passed upon by the courts below (No. 47, R. 16-19, 44, 46-49, 50, 53). The judgment of the Supreme Court of Nebraska was entered on March 19, 1948 (No. 47, R. 52). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended, 28 U.S.C.A. 344. On May 24, 1948, this Court noted probable jurisdiction (No. 47, R. 86).

## Jurisdiction—North Carolina Case (No. 34)

The federal questions here presented were properly raised and preserved and were passed upon by the courts below (No. 34, R. 4, 5, 6, 56, 57-80). The judgment of the Supreme Court of North Carolina was entered on December 19, 1947 (No. 34, R. 80). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended, 28 U.S.C.A. 344. On March 29, 1948, this Court noted probable jurisdiction (No. 34, R. 88).

## Questions Presented

The question presented in each of the foregoing cases is whether, pursuant to either a constitutional amendment or a statute, a State may, consistent with the federal Constitution, flatly prohibit rather than regulate the right of labor organizations and employers to enter into and enforce mutually satisfactory arrangements concerning union secu-

rity whereunder an employee is required to maintain union membership as a condition of employment.

### Statutes Involved—Arizona Case

At the 1946 general election the State of Arizona duly adopted the following amendment to its constitution:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

### Statutes Involved—Nebraska Case

On November 5, 1946, the State of Nebraska duly adopted the following amendment to its constitution, which amendment, designated as Sections 13, 14 and 15 of Article XV, became effective November 11, 1946:

> "Section 13. No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization.
>
> "Section 14. The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
>
> "Section 15. This article is self-executing and shall supersede all provisions in conflict therewith; legisla-

tion may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

## Statutes Involved—North Carolina Case

The Legislature of the State of North Carolina, at its 1947 session, passed the following statute (Ch. 328 of the Session Laws of 1947):

"An Act to Protect the Right to Work and to Declare the Public Policy of North Carolina with Respect to Membership or Non-membership in Labor Organizations as Affecting the Right to Work: To Make Unlawful and to Prohibit Contracts or Combinations Which Require Membership in Labor Unions, Organizations or Associations as a Condition of Employment: To Provide That Membership in or Payment of Money to Any Labor Organization or Association Shall Not Be Necessary for Employment or for Continuation of Employment and to Authorize Suits for Damages.

"The General Assembly of North Carolina do enact:

"Section 1. The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association.

"Sec. 2. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

"Sec. 3. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

"Sec. 4. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

"Sec. 5. No employer shall require any person, as a condition of employment or continuation of employment to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

"Sec. 6. Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 3, 4, and 5, or of one or more of such Sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

"Sec. 7. The provisions of this Act shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

"Sec. 8. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, and the application thereof to other person or circumstances, but shall be confined to the part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved.

"Sec. 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 10. This Act shall be in full force and effect from and after its ratification."

Chapter 75 of the General Statutes makes combinations, conspiracies and contracts in restraint of trade illegal and punishable as misdemeanors.

## Statement of the Case--Arizona

The factual situation in respect to which the Arizona amendment has been applied is set forth in a complaint for declaratory judgment and equitable relief, the defendants named in such complaint having moved to dismiss such complaint, and the trial court and the State Supreme Court having sustained such motions. The plaintiffs in the trial court are the appellants here, and the defendants are the appellees herein.

The appellants are the American Federation of Labor (No. 27, R. 4); the Arizona State Federation of Labor (No. 27, R. 4); Phoenix Building and Construction Trades Council (No. 27, R. 5); the United Brotherhood of Carpenters and Joiners of America, A.F.L. (No. 27, R. 6); Millmen, Cabinet Makers and Lumber Handlers Union No. 2093, affiliated with such United Brotherhood of Carpenters and Joiners of America, which takes into membership employees in the wood milling and cabinet making trades in the City of Phoenix (No. 27, R. 7); Forrest L. Stiers, President of such Local, employed by the appellee American Sash & Door Company (No. 27, R. 7), and Ralph Henley, an employer engaged in the manufacture of sash, doors and fixtures in the City of Phoenix and doing business under the name of Ralph Henley Millwork (No. 27, R. 19).

The appellees are the American Sash & Door Company, an employer engaged in manufacturing sash and doors in interstate commerce (No. 27, R. 20); D. A. Brewer, an employer engaged in concrete construction work in intrastate commerce (No. 27, R. 21); three individuals whose employment status is affected under union-shop agreements (No. 27, R. 21-22), and the State Attorney General (No. 27, R. 22).

On February 12, 1947, appellants filed a complaint as plaintiffs in the Superior Court of Maricopa County, seeking a declaratory judgment and equitable relief in respect to the application or attempted application as against them of an amendment to the Constitution of the State of Arizona, adopted in November of 1946 and commonly referred to as the "Right-to-Work" or "Anti-Closed-Shop" Amendment (No. 27, R. 1-55).

As disclosed by the complaint, the amendment was being applied or threatened to be applied in respect to the four following factual situations:

1. Prior to the adoption of the Amendment, appellant Local Union No. 2093 (which then and at all times subsequently represented all of the employees in the bargaining unit (No. 27, R. 23)) entered into a contract requiring membership as a condition of employment with appellee American Sash & Door Company (No. 27, R. 23), an employer engaged in interstate commerce (No. 27, R. 20), as did also appellant Phoenix Building and Construction Trades Council with appellee D. A. Brewer (No. 27, R. 24), an employer engaged in intrastate commerce (No. 27, R. 21). At a date subsequent to the Amendment, one employee of each of said employers wilfully defaulted in dues, and lost his membership in his union (No. 27, R. 33, 34). The respective unions requested such employers to discharge such employees pursuant to the union-security clause, but the employer refused to do so solely because of the existence of the Anti-Closed-Shop Amendment and because of threats, both by the Attorney General of the State and by the individuals whose discharge was requested, to institute civil and criminal prosecutions for violations of the Amendment (No. 27, R. 33, 34).

2. Subsequent to the effective date of the Amendment, appellant-employer Ralph Henley and appellant Local Union No. 2093 (which then and ever since has represented all of the employees of the said employer (No. 27, R. 25)) entered into an agreement which, among other things,

required membership in the union as a condition of employment (No. 27, R. 26). A member of the union employed by Henley wilfully defaulted in dues, and lost his membership in the union (No. 27, R. 36). The union requested such employer to discharge the employee pursuant to the union-security clause, but the employer, although otherwise willing, refused to do so because of the existence of the Anti-Closed-Shop Amendment and because of threats, both by the Attorney General of the State and by the union member whose discharge was requested to institute civil and criminal prosecutions for violation of the Amendment (No. 27, R. 36).

3. Appellant Arizona State Federation of Labor had for many years published and distributed a labor newspaper on behalf of the labor movement. It customarily employed only union members. Subsequent to the effective date of the Amendment, it denied employment to an applicant upon the sole grounds that he was not a member of a labor organization (No. 27, R. 26-27). The Attorney General of the State thereupon threatened to institute civil and criminal prosecutions against such appellant (No. 27, R. 31-32).

4. The Attorney General of the State has made repeated threats to all the appellants and to other labor organizations and employers similarly situated that he would immediately bring civil and criminal prosecutions if there were any violations of the law, as by attempting to make or by making any type of union-security agreement, or by enforcing any union-security agreement (No. 27, R. 30-32).

It was alleged (and thus admitted for the purpose of this case) that the ability to enter into and secure union-shop or other union-security contracts or arrangements with employers was indispensable to the functioning of appellants and other labor organizations and to the fulfillment of their purposes (No. 27, R. 11); that the obtaining of union-security agreements constitutes the only proven and effective means for working people to obtain and insure (1)

their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate share of the joint product of capital and labor, and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees; that the organizations in question had duly adopted provisions in their constitutions requiring all persons desiring to obtain or retain membership in the organization to work only with persons who were also members of the union (No. 27, R. 14); that membership in plaintiff labor organizations, including the appellant United Brotherhood of Carpenters and Joiners of America and plaintiff Local Union No. 2093, as well as all other labor organizations operating in the State of Arizona, is open to all qualified persons, and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition of membership (No. 27, R. 16).

The appellants alleged that the Amendment in question was unconstitutional and void for the following reasons: (a) the Amendment impaired the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution; (b) the Amendment arbitrarily and unreasonably deprived appellants of fundamental rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution; (c) the Amendment deprived the union appellants of fundamental rights and freedoms guaranteed under the First Amendment as a concomitant of the right of assembly and speech and protected against invasion by the State under the Fourteenth Amendment, and (d) the Amendment denied the union appellants equal protection of the laws contrary to the Fourteenth Amendment (No. 27, R. 37-46).

Appellants alleged grave, immediate and irreparable damage to them if the Amendment were to be applied as

threatened (No. 27, R. 46-49). Included in such injury was disruption of employment relations and production, loss of present and prospective members, disorganization and disintegration of the unions and loss in their bargaining position, multiplicity of prosecutions in labor proceedings.[1]

Appellants sought the following relief in their complaint: (a) an injunction in the nature of a decree for specific performance requiring the respective employers to fulfill their obligations under their contracts; (b) injunctive relief against the Attorney General and his agents, restraining them from enforcing or threatening to enforce the Anti-Closed-Shop Amendment; and (c) a declaratory judgment setting forth the rights and duties of the parties under their existing agreement and under the Amendment (No. 27, R. 50-55).

Appellees moved to dismiss the complaint on the ground that since the Amendment was constitutional no cause of action was stated (No. 27, R. 83-86). The trial court granted these motions and orderd the complaint dismissed on the ground that the Amendment did not violate the federal Constitution (No. 27, R. 95-98, 108).

Appellants then appealed to the Supreme Court of the State of Arizona, raising the same constitutional issues that were raised under the complaint (No. 27, R. 99, 110).

On February 4, 1948, the Supreme Court of the State of Arizona handed down its decision and judgment in which it considered each of the federal questions raised by the appellants, decided each of such questions adversely to appellants' contentions and affirmed the judgment below (No. 27, R. 112-132). One of the three justices dissented (No. 27, R. 132). In its judgment the Supreme Court of

[1]In short, the irreparable injury alleged in the present case is the same as that alleged in the case of *American Federation of Labor, et al. v. Watson*, 327 U.S. 582, which this Court found sufficient to invoke the equitable jurisdiction of a Federal District Court. The State Supreme Court made no finding that the facts alleged were insufficient to justify equitable relief but, instead, dismissed the complaint on the sole ground that the Amendment was constitutional.

Arizona affirmed the judgment of the trial court in dismissing the complaint (No. 27, R. 142). The sole reason assigned for dismissal of the complaint was the constitutionality of the Amendment, the complaint otherwise stating a cause of action in each of the particulars alleged. Thus, the Supreme Court construed the Amendment (1) to impair the obligations of union-security agreements entered into prior to the effective date of the Amendment; (2) to prevent the making or enforcing of agreements entered into subsequent to the effective date of the law; (3) to prevent employers from employing union members only, and (4) to be enforceable by suit for injunction and suit for damages and by criminal prosecutions by the Attorney General.

Thereafter, appeal was taken to this Court (No. 27, R. 133), and on March 29, 1948, this Court noted probable jurisdiction (No. 27, R. 143).

## Statement of the Case—Nebraska Case

The factual situation in respect to which the Nebraska amendment has been applied is set forth in a complaint for declaratory judgment and equitable relief, the defendants named in such complaint having moved to dismiss such complaint, and the trial court and the State Supreme Court having sustained such motions. The plaintiffs named in the complaint are the appellants here, and the defendants are the appellees herein.

The appellants are the American Federation of Labor (No. 47, R. 2); Lincoln Federal Labor Union No. 19129, a local labor union affiliated with the American Federation of Labor, whose members are employed in Lincoln, Nebraska, by the Northwestern Iron and Metal Company (No. 47, R. 4, 5); the Nebraska State Federation of Labor (No. 47, R. 2), and Henry Reichel, President of Lincoln Federal Labor Union No. 19129, employed by the appellee Northwestern Iron and Metal Company (No. 47, R. 4).

The appellees are the Northwestern Iron and Metal Company, an employer engaged in the scrap metal business

(No. 47, R. 4); Dan Giebelhouse, an employee of such employer (No. 47, R. 5, 9), and the State of Nebraska (No. 47, R. 12). The Nebraska Small Business Men's Association, an organization of business firms operating in the State of Nebraska, moved for and were granted leave to appear in the case as an intervenor (No. 47, R. 38, 39).

The complaint alleged that prior to the adoption of the Amendment the employees of the Northwestern Iron and Metal Company unanimously selected the appellant Lincoln Federal Labor Union No. 19129 as their bargaining representative and unanimously authorized such union to enter into a union-shop contract with the appellee Northwestern Iron and Metal Company (No. 47, R. 11). Such contract, requiring all the employees to maintain their membership in good standing as a condition of employment (No. 47, R. 9), was entered into between the union and the employer also at a date prior to the effective date of the Amendment (No. 47, R. 9). At a time following the effective date of the Amendment, one of the employees, namely, Dan Giebelhouse, refused to pay his dues and lost his membership in the union (No. 47, R. 9). The union thereupon requested the employer to discharge such employee, but the employer, notwithstanding the express provision of its collective bargaining contract then in existence, refused to do so, taking the position that the Anti-Closed-Shop Amendment rendered the union-shop provisions invalid (No. 47, R. 10).

It was alleged (and thus admitted for the purpose of this case) that the ability to enter into and secure union-shop or other union-security contracts or arrangements with employers was indispensable to the functioning of appellants and other labor organizations and to the fulfillment of their purposes (No. 47, R. 6); that the obtaining of union-security agreements constitutes the only proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate

share of the joint product of capital and labor, and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees (No. 47, R. 7); that membership in appellant labor organizations, including the appellant Lincoln Federal Labor Union No. 19129, as well as all other labor organizations operating in the State of Nebraska, is open to all qualified persons, and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition of membership (No. 47, R. 7).

The appellants alleged that the amendment in question was unconstitutional and void for the following reasons: (a) the amendment impaired the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution; (b) the amendment arbitrarily and unreasonably deprived appellants of fundamental rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution; (c) the amendment deprived the appellants of fundamental rights and freedoms guaranteed under the First Amendment as a concomitant of the right of assembly and speech and protected against invasion by the State under the Fourteenth Amendment; and (d) the amendment denied the appellants equal protection of the laws contrary to the Fourteenth Amendment (No. 47, R. 16-20).

The appellants sought the following relief in their complaint:

1. A declaratory judgment determining the rights, status and other legal relations of the parties to the contract with respect to said amendment and to declare said amendment to be unconstitutional and void as in conflict with the federal Constitution.

2. An order requiring the employer to specifically perform its contract under its terms, and enjoining the Com-

pany from continuing Dan Giebelhouse in its employ (No. 47, R. 20).

The appellees moved, in effect, to dismiss the complaint on the ground that, since the amendment was constitutional, no cause of action was stated (No. 47, R. 40, 41). The trial court granted such motions on such ground and, in doing so, considered and denied each of appellants' contentions respecting the invalidity of the amendment under the federal Constitution (No. 47, R. 44).

The appellants then appealed to the Supreme Court of Nebraska, assigning as error the action of the trial court in refusing to sustain appellants' contention that the amendment was unconstitutional in the various respects as set forth in the complaint and in refusing to grant the relief prayed. Pursuant to their appeal to the Supreme Court of Nebraska, appellants briefed and argued the specific questions under the federal Constitution that were raised before the trial court (No. 47, R. 50).

On March 19, 1948, the Supreme Court of Nebraska handed down its decision and judgment in which it considered each of the federal questions raised by the appellants, decided each of such questions adversely to the appellants' contentions and affirmed the judgment below (No. 47, R. 53). In its judgment the Supreme Court of Nebraska affirmed the judgment of the trial court in dismissing the complaint (No. 47, R. 52). The sole reason assigned for dismissal of the complaint was the constitutionality of the amendment, the complaint otherwise stating a cause of action in each of the particulars alleged. Thus, the Supreme Court construed the amendment (1) to impair the obligations of union-security agreements entered into prior to the effective date of the law; (2) to prevent the making or enforcement of agreements subsequent to the effective date of the law; (3) to prohibit any attempt by an employer to employ union members only, whether by formal agreement or otherwise; and (4) specifically to prevent enforcement of an agreement requiring an em-

ployee to maintain his good standing in the union as a condition of employment, and this even though such agreement was entered into prior to the effective date of the law.

Thereafter, appeal was taken to this Court (No. 47, R. 78), and on May 24, 1948, this Court noted probable jurisdiction (No. 47, R. 86).

### Statement of the Case—North Carolina Case.

The North Carolina anti-closed-shop statute is before this Court on appeal from the criminal conviction for violation of the law by appellants in entering into a union-security agreement. Appellants in this Court were the defendants in the criminal proceedings in the North Carolina courts.

Appellant George Whitaker is a building contractor employing union labor in the City of Asheville, North Carolina (No. 34, R. 8, 14). Appellant A. M. DeBruhl is an officer of the Asheville Building and Construction Trades Council, A. F. of L., and the remaining appellants are officers, agents and members of local trade unions or craft organizations affiliated with the Council and with the American Federation of Labor, all functioning in the City of Asheville (No. 34, R. 8).

On May 20, 1947, the appellant Whitaker executed a collective bargaining agreement with the other appellants under which appellant Whitaker, among other things, agreed to employ only members of the local craft unions who were parties to such contracts (No. 34, R. 8). On July 15, 1947, a warrant was issued against the appellants charging them with having violated Chapter 328 of the Session Laws of 1947 (commonly known as the "Anti-Closed-Shop Law") by having entered into such agreement (No. 34, R. 2). More specifically, the warrant charged that appellants had entered into

> ". . . an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in the State of North Carolina and against the public policy

of the State of North Carolina, by executing a written agreement or contract by and between said employer and said Labor Unions and Organizations or combinations, whereby persons not members of said unions or organizations are denied the right to work for said employer, or whereby membership is made a condition of employment or continuation of said employment by said employer and whereby said named unions acquired an employment monopoly in any and all enterprises which may be undertaken by said employer are required to become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment by said employer whereby said unions acquire an employment monopoly in any and all enterprises entered into by said employer in violation of House Bill No. 229, Session 1947, General Assembly of North Carolina, Chapter 328, 1947 Session Laws of North Carolina, and particularly sections 2-3 and 5 thereof, and Chapter 75 of the General Statutes of N. C., . . .". (No. 34, R. 2-3).

Thereupon, the appellants, through their counsel, filed a written motion to quash the warrant, alleging, *inter alia*, that the said Chapter 328 was void, illegal and unconstitutional, in that it arbitrarily and unreasonably deprived appellants of fundamental rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution, deprived the appellants, other than Whitaker, of fundamental rights and freedoms guaranteed under the First Amendment as a concomitant of the right of assembly and speech and protected against invasion by the State under the Fourteenth Amendment, and denied such appellants equal protection of the laws contrary to the Fourteenth Amendment (No. 34, R. 4).

The motion was denied (No. 34, R. 5) and the appellants were tried before a jury. The jury found appellants guilty of the acts charged in the warrant and entered a verdict of guilty (No. 34, R. 5). The trial court adjudged the appellants guilty and imposed a fine of $50 on each appellant (No. 34, R. 7). The appellants then moved for

an arrest of judgment in which were raised the same constitutional objections that were raised under the motion to quash the warrant (No. 34, R. 6). This motion was likewise overruled (No. 34, R. 7). The appellants then assigned as error the trial court's action in overruling the motion to quash and the motion for arrest of judgment, as more particularly set forth in such motions, and appealed to the Supreme Court of the State of North Carolina (No. 34, R. 56).

While the evidence before the jury clearly indicated that appellants had entered into the union-security agreement as charged, there was also uncontradicted evidence by expert witnesses (and thus admitted for the purpose of this case) that the ability to enter into and secure union-shop or other union-security contracts or arrangements with employers was indispensable to the functioning of appellants and other labor organizations and to the fulfillment of their purposes; that the obtaining of union-security agreements constitutes the only proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate share of the joint product of capital and labor, and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees; that membership in appellant labor organizations, as well as all other labor organizations operating in the State of North Carolina, is open to all qualified persons, and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition to membership.

Appellants, pursuant to their appeal to the Supreme Court of North Carolina on the foregoing assignment of errors, briefed and argued the federal questions before that Supreme Court. On December 19, 1947, the Supreme

Court of North Carolina handed down its decision and judgment in which it considered each of the federal questions raised by appellants, decided each of said questions adversely to appellants' contentions, and affirmed the conviction (No. 34, R. 57-80). Further, the Court specifically held that the violations of the law constituted a criminal offense (No. 34, R. 63), and construed the law completely to outlaw, not merely to condition or regulate, the making of union-security agreements in North Carolina, so that the use of such agreements is forbidden in the State under any and all circumstances. The judgment (No. 34, R. 80) specifically affirmed the judgment of the Court below, finding appellants guilty of a misdemeanor and fining them the sum of $50.00 each above costs.

Thereafter, appeal was taken to this Court (No. 34, R. 81), and on March 29, 1948, this Court noted probable jurisdiction (No. 34, R. 88).

## Specification of Errors—Arizona Case

1. The Supreme Court of Arizona erred in affirming the judgment of the trial court dismissing appellants' complaint for the reason that the amendment was valid and did not contravene the federal Constitution, and thus no cause of action was stated.

2. The Supreme Court of Arizona erred in failing to hold that the amendment deprived union appellants of rights guaranteed under the First Amendment and protected against invasion by the State under the Fourteenth Amendment to the United States Constitution.

3. The Supreme Court of Arizona erred in failing to hold that the amendment was unconstitutional as impairing the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution.

4. The Supreme Court of Arizona erred in failing to hold that the amendment deprived appellants of rights protected under the due process clause of the Fourteenth Amendment to the United States Constitution.

5. The Supreme Court of Arizona erred in failing to hold that the amendment denied the union appellants the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution.

## Specification of Errors—Nebraska Case

1. The Supreme Court of Nebraska erred in affirming the judgment of the trial court dismissing appellants' complaint for the reason that the amendment was valid and did not contravene the federal Constitution, and thus no cause of action was stated.

2. The Supreme Court of Nebraska erred in failing to hold that the amendment deprived union appellants of rights guaranteed under the First Amendment and protected against invasion by the State under the Fourteenth Amendment to the United States Constitution.

3. The Supreme Court of Nebraska erred in failing to hold that the amendment was unconstitutional as impairing the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution.

4. The Supreme Court of Nebraska erred in failing to hold that the amendment deprived appellants of rights protected under the due process clause of the Fourteenth Amendment to the United States Constitution.

5. The Supreme Court of Nebraska erred in failing to hold that the amendment denied the union appellants the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution.

## Specification of Errors—North Carolina Case

1. The Supreme Court of North Carolina erred in sustaining the judgment and convictions of the trial court and in failing to hold that Sections 2, 3 and 5 of Chapter 328 of the North Carolina Session Laws of 1947 are invalid as contrary to the federal Constitution.

2. The Supreme Court of North Carolina erred in failing to hold that the statute deprived union appellants of rights guaranteed under the First Amendment and protected against invasion by the State under the Fourteenth Amendment to the United States Constitution.

3. The Supreme Court of North Carolina erred in failing to hold that the statute deprived appellants of rights protected under the due process clause of the Fourteenth Amendment to the United States Constitution.

4. The Supreme Court of North Carolina erred in failing to hold that the statute denied the union appellants the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution.

## SUMMARY OF ARGUMENT

The laws involved herein flatly prohibit, do not regulate, any agreement or arrangement between labor organizations and employers whereunder union membership is made a condition of employment, and this without providing any substitute or equivalent for the function performed by such agreements in protecting labor organizations and making them effective. As such, they adversely affect not only contract rights and liberties protected under the Fourteenth Amendment and the contract clause, but also impair the fundamental right of assembly as exercised by workingmen when they seek to form and maintain unions. *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U.S. 1; *Thomas v. Collins*, 323 U.S. 516. For historical experience, economic necessity, analysis of the nature of unions, the analogy of their function in an industrial society to government in a political society, and legal doctrine from *Commonwealth v. Hunt*, 45 Met. (Mass.) 111, to *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, all indicate that, absent statutory protection of the right of organization and an exclusive bargaining status, union membership as a condition of employment is indispensable to the right of self-organization and the association of workers into unions. Without such recognition of the right of union members to refuse to work with nonmembers, as formalized in a union-shop agreement, there is no way to enforce adherence to the common rules of employment, which is the very basis of unionism, no means of eliminating the competition of the non-union worker, no way of maintaining full equality of bargaining power and of consolidating gains achieved through the process of collective bargaining. It is no happenstance that union membership as a condition of employment is coeval with trade unionism itself, or that today it embraces over 75% of all workers under collective agreements. Destruction of that principle in States where no equivalent statutory framework of protection is afforded means destruction of the right of self-organization itself.

Rights so essential to the preservation of a free society as the right of employees to assemble into and associate together through labor organizations cannot be threatened or impaired by outlawing an indispensable concomitant thereof save under circumstances of overriding and immediate public necessity. No such justification either exists or can be asserted. If it be asserted that protection of an alleged right to work as a non-union member affords justification, the answer is, first, that a hoped for job is not a property right protected under the Constitution, and, in any event, union membership as a condition of employment does not deprive of a right to work in an absolute sense where, as here, membership is open to all qualified applicants; and, second, that the right to work as a non-unionist is in no way equivalent to or the parallel of the right to work as a union member; that there exists no constitutional right to work as a non-unionist on the one hand while the right to maintain employment free from discrimination because of union membership is constitutionally protected. *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U.S. 1; *Phelps-Dodge Corporation v. N.L.R.B.*, 313 U.S. 177. Finally, no right to work as a non-unionist can be created and protected by the State where its exercise impairs the exercise by others of fundamental rights of association under the Constitution. If it be asserted that prevention of a "monopoly of labor" allegedly created by union-security agreements affords justification, the answer is that the labor of a human being is not an article of commerce within the usual concept of monopoly restrictions, and that while industry in a free-enterprise society may thrive on competition between business, labor can but die on competition between workers. It is the necessary object of any union to eliminate the competition of non-union workers (*Apex Hosiery Co. v. Leader*, 310 U.S. 469), so that to outlaw this object would be to outlaw the principle of self-organization itself.

Even if rights of contract, protected solely under the Fourteenth Amendment or the contract clause, were alone

deemed affected by the enactments herein, nevertheless the laws must fall as being demonstrably arbitrary, excessive and discriminatory. There is no real basis for the absolute prohibitions in either existing conditions or conditions reasonably to be feared; justifications such as protection of right to work, prevention of monopoly, prevention of strikes and internal abuses by unions under closed-shop contracts, all prove inadequate upon analysis. The prohibitions being without rational basis, they are in violation of the Fourteenth Amendment and the contract clause. *Nebbia v. New York,* 291 U.S. 502; *Wolff Packing Co. v. Court of Industrial Relations,* 262, U.S. 522; *Home Building & Loan Co. v. Blaisdell,* 290 U.S. 398. Whatever abuses may arise by virtue of union-security agreements can and should be reached by regulation and not proscription; considering the nature and function of the union-security principle, total prohibition thereof is entirely incommensurate with any possible public good thereby effected and is therefore an excessive and arbitrary exercise of state police power. *Adams v. Tanner,* 244 U.S. 590; *Weaver v. Palmer Brothers Company,* 270 U. S. 402; *Liggett v. Baldridge,* 278 U.S. 105; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393. Indeed, total prohibition, far from being in the public interest, is in fact at public expense and solely in the interest of a private few, namely, the non-unionists who desire to enjoy the benefits of collective bargaining without contributing to the costs thereof, and as such is equally repugnant to the Fourteenth Amendment. *Treigle v. Acme Homestead Association,* 297 U.S. 189. If, under the circumstances shown to exist and the justifications advanced, total proscription, as distinguished from regulation, of the union-security principle is not violative of the federal Constitution, then no institution, no enterprise, no activity is safe from legislative abolishment under a claim of public interest. To accord the States leeway in social experimentation is not to sanction license; if any individual freedoms are to remain, the Constitution

must stand as a barrier against gratuitous and entirely unnecessary destruction of traditional activities.

Finally, the total deprivation to union members and union appellants herein of the right to enter into and maintain union-security agreements denies them equal protection of the laws in a number of respects. The Arizona enactment in particular is discriminatory in its prohibition of any alleged discrimination by an employer against an employee because of his non-union membership and its failure to accord the same protection to an employee because of his union membership.

## ARGUMENT

### I

### THE ENACTMENTS HEREIN HAVE THE EFFECT OF UNCONDITIONALLY PROHIBITING, NOT MERELY REGULATING, THE MAKING OF CONTRACTS OR OTHER ARRANGEMENTS FOR UNION MEMBERSHIP AS A CONDITION OF EMPLOYMENT, AND THUS INVOLVE NOT ONLY RIGHTS OF CONTRACT BUT ALSO MORE FUNDAMENTAL RIGHTS PROTECTED UNDER THE FIRST AMENDMENT AS A CONCOMITANT OF THE RIGHT OF ASSEMBLY.

As seen from the statement of cases herein, the States of Arizona, Nebraska and North Carolina have completely outlawed, not merely regulated, the union-security principle. None of the prohibitions against making union-security arrangements is conditioned upon the desires of the parties (including the individual employees) affected thereby, or upon conditions in any particular industry, including the extent to which employees in an industry are organized, or upon the manner in which the union party to the contract may function internally, as in regard to admissions and expulsions or the furnishing of labor or other practices which may affect an employment status under a union-security contract. The prohibition is absolute no matter what the circumstances.

More specifically, in the Arizona case (No. 27, R. 130) the right to enforce agreements (entered into both before and after the effective date of the law) requiring employees to remain union members as a condition of employment has been denied the union party to such contract, and an employer publishing a union newspaper has been denied the right to deny employment to a job applicant on the ground that he is not a member of a labor organization. Furthermore, the mere making of union-security agreements of any type has been prohibited.

In the Nebraska case (No. 47, R. 57) the union has been denied the right to require an employer to discharge an employee under a commitment entered into prior to the law that he would retain in his employment only union members.

In the North Carolina case (No. 34, R. 77) it has been held a criminal offense for a group of building trades unions and an employer to enter into an agreement whereunder the employer would hire only members of the contracting unions.

In these cases it is clear, from the language of the decisions interpreting the law, that employers cannot, with or without formal contract, assent to a union's request to discharge non-union employees, and unions cannot attempt to enforce rules requiring members to work only with fellow members. For the laws in question not only proscribe the making and enforcing of union-security agreements as such, they also prohibit any loss of employment status because of non-membership in a labor organization. Thus, the one method—union membership as a condition of employment—that associations of workingmen, wherever formed, have from the first days of trade union history found not only effective but indispensable for the protection of their organization and the consolidation of their gains has been eliminated, and this without the substitution of an equivalent protection of the basic right of self-organization. None of the states here involved has enacted any statutory scheme similar to the National Labor Relations Act, the Railway Labor Act or the Norris-LaGuardia Act for the protection of labor's fundamental rights; unions in these States must, at least in intrastate industries, rely now as in the past on traditional practices to secure their existence.

In order to determine whether the prohibitions embodied under the laws of Arizona, Nebraska and North Carolina contravene constitutional protections, it is necessary first to determine the nature of the constitutional rights in-

volved and the impact of the prohibitions upon these rights:[2]

Some aspects of the importance and value of the right of labor organizations, or of employees acting collectively through labor organizations, to enter into mutually satisfactory agreements with employers embodying conventional union-security arrangements variously termed "closed shop," "union shop," "preferential shop" or "maintenance of membership"[3] are affirmatively set forth in the record. Thus, the undisputed, expert testimony of the long-time President of the North Carolina State Federation of Labor, a principal union witness in the North Carolina case, discloses that the union-security agreement constitutes the most effective, indeed an indispensable, means of securing and maintaining for union organizations and their members

> "Job security and protection from employer discrimination by removal of motives to discharge or demote because of union activity.
>
> "Equality of bargaining power, with consequent betterment of working conditions by insuring labor a united front in the contest for a fair share of the joint products of capital and labor.
>
> "Protection of working standards by preventing cut-throat wage competition by non-union employees.
>
> "Equality of sacrifice by insuring that all who enjoy union wages and working conditions, achieved through years of struggle and deprivation, share in the costs

[2] An adequate presentation of this aspect of appellants' arguments, as well as of the argument that the prohibitions are arbitrary, discriminatory and without rational basis, requires examination of certain economic data and related factual material of which this Court can take judicial notice, which material has been incorporated in an Economic Brief which appellants have filed along with their principal brief and to which reference will be made when relevant. For the Court's convenience there is also attached to the Economic Brief as "Appendix E" an article entitled *State Legislation Banning Union-Security Agreements: The Due Process Issue and Judicial Self Restraint*, written by Joseph P. Witherspoon, Jr., appearing in the Texas Law Review, Vol. XXVI, for November, 1947, No. 1, page 47. This article contains additional economic material and much helpful legal analysis to which reference will also be made hereafter.

[3] For some standard definitions of the various types of union-security agreements, see Economic Brief, pp. 2-4.

of such benefits as members of the union rather than as 'free riders.'

"An increased measure of union responsibility for their obligations under collective bargaining agreements by providing a means of imposing disciplinary action, and an ability effectively to police collective bargaining agreements to the end of obtaining full compliance on the part of the employees embraced thereunder, it being impossible to secure such full compliance where some employees are not union members and thus not subject to union laws and discipline.

"Elimination of jurisdictional strife by safe-guarding against raids and other disruptive tactics of rival labor organizations.

"And, finally, security and maintenance of organization once it has been achieved thereby promoting labor-management cooperation by eliminating the suspicion and hostility which often characterizes the initial stages of employer recognition and freeing union energies and resources for constructive cooperation rather than defensive sparring." (No. 34, R. 13-14.)

For similar undisputed statements respecting the function of union-security agreements in Arizona, see No. 27, R, 11-13, and in Nebraska see No. 47, R. 7. See also Economic Brief, pp. 19-66.

Another obvious right here involved is that of employers to enter into union-security agreements with labor organizations and to employ or retain in employment such employees as are deemed most conducive to harmonious and productive relationships. That it is very often to the employer's best interests to retain in his employment union members only has been made clear in the record. Mr. Whitaker, employer-defendant in the North Carolina case, stated, without contradiction, in this respect as follows:

"For thirty years I have been engaged in building construction and have dealt with unions during that period.

"Based upon my experience as I know the effects of union security agreements on the economic welfare of North Carolina from the employers' viewpoint, I

have found that union security agreements result in stability of employment relationships, the promotion of harmony and cooperation as between employer and employees, the elimination of strife and discord both within the plant and as between rival labor organizations, the making available of sufficient skilled, competent and experienced artisans through the training of apprentices, the stabilization of employee's compensation by the predetermination of applicable wage rates, all having the effect of and actually resulting in increasing production." (No. 34, R. 14-15.)

For similar statements in the Arizona case see No. 27, R. 19-20, 26-27,[4] and in the Nebraska case No. 47, R. 8.

In the Arizona and Nebraska cases, another right affected by the prohibition is the right to rely on provisions of contracts once they are entered into, protected specifically under Section 10 of Article I of the Constitution providing that no State shall pass any laws impairing the obligations of existing contracts.

From the facts in the instant cases and the decisions of the state courts construing the laws, it is apparent, therefore, that, at a minimum, rights of contract which have many times been held to constitute a liberty or property right protected directly under the Fourteenth Amendment or under the contract clause are here involved. But, as will be shown in the next portion of this brief, the right of associations of workingmen, through the device of the union-security agreement, to seek protection for the existence of their association, to obtain an equality of bargaining power, to remove the competition of non-union labor, to enforce common rules, and to obtain consolidation of their gains involves a great deal more than the bare right to make a contract. It embodies the exercise of a right which all experience has demonstrated is a necessary and indispensable concomitant of the right of workers to assemble into

[4] In the case of the Arizona employer, the importance of the right is strikingly illustrated. There, the employer was a publisher of a labor newspaper which customarily and traditionally employed union members only as a necessary adjunct to the successful operation of its business.

labor organizations in the first place, and without which the right of association would be useless. It embodies the exercise of a traditional basic principle of any union member—that of refusing to work with employees not members of the association as a means of maintaining and improving working rules common to all.

## II

## STATUTES FLATLY PROHIBITING UNION MEMBERSHIP AS A CONDITION OF EMPLOYMENT IN ANY FORM DENY FUNDAMENTAL RIGHTS IN VIOLATION OF THE GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

### A. The Right to Form Unions and to Carry on Essential Union Activities is an Exercise of The Right of Association Conjointly with the Other Rights Guaranteed by the First Amendment.

In the cases at bar, the right to form and maintain a union is necessarily in issue when an indispensable element of that right—union membership as a condition of employment—is proscribed. That union membership is an indispensable element of the right will be demonstrated in the next portion of this brief. For present purposes, it is necessary to determine the nature and status of the right of workers to form and maintain unions. That we assert to be a fundamental right. It is not a concept of natural justice. Cf. dissenting opinion of Mr. Justice Black in *International Shoe Co. v. Washington*, 326 U.S. 310, 322. It is a specific exercise of the right of assembly. This Court, without specifying the precise right involved, has positively decided that "the right of employees to self-organization is a fundamental right." It is not dependent upon statutory creation, though it may be given statutory protection. *N.L.R.B. v. Jones & Laughlin*, 301 U.S. at 33; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, at 263. See also *N.L.R.B. v. Budd Manufacturing Co.* (C.C.A. 6) Fed. (2d) , decided August 16, 1948; *Inland Steel Co. v. N.L.R.B.* (C.C.A. 7) Fed. (2d) , decided September 23, 1948.

A fundamental right is one protected by the Constitution. *West Virginia v. Barnette*, 319 U.S. 624, at 638. And the right in the case at bar is an exercise by workmen of the

right to assemble and to petition for redress of grievances in the field of economic interests. It is not a coincidence of language that the complaint of an employee against the denial of the fair application of job rules by the employer is in legal and popular language a "grievance." See *Elgin, Joliet & Eastern R. R. v. Burley*, 325 U.S. 711.

The First Amendment to the Constitution of the United States guarantees the fundamental rights of individuals in a democratic society:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition for the redress of grievances."

By the Fourteenth Amendment, these guarantees are also barriers to any infringement by the State. *West Virginia v. Barnette*, 319 U.S. at 639.

These rights are exercised by workmen when they organize themselves into a union and carry on its essential activities. It has been a long journey, but the constitutional ground for union rights is now firmly secured. Once this point was reached, the confusions of the past were lifted. To reach it required only the recognition that constitutional rights are exercised by people in their everyday affairs. This principle was given full expression in *Thomas v. Collins*, 323 U.S. at 516.

> "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.
>
> "The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity." (323 U.S. at 531.)

There was no disagreement on this principle in the *Thomas* case. Mr. Justice Jackson, who concurred, argued that the principle had not been consistently applied, and

should be extended to include the employers' freedom of speech. The dissenting minority divided only because, in their judgment, a statute requiring registration of union organizers did not prevent freedom of speech and assembly, but merely required identification of those whose vocation included speaking.

The safeguards of the First Amendment were applied in the *Thomas* case to a single union meeting. In the *Hague* case, they had earlier been applied to protect the right to hold a series of meetings to organize unions. In the *Thornhill* and *Carlson* cases (*Thornhill v. Alabama*, 310 U.S. 88, and *Carlson v. California*, 310 U.S. 106) the Court had agreed that "in the circumstances of our times" the guarantee of free speech embraced the peaceful dissemination of "the facts of a labor dispute by a labor organization through peaceful picketing."

Workingmen exercise their right of assembly in a very real and very practical sense when they form unions and participate in their affairs. A union is an assembly of individuals into an association for the government of their common affairs for the improvement of their conditions and advancement of their welfare. It is a continuing and permanent assembly and conducts its affairs in an organized way; it is therefore, usually referred to as an association or an organization; but this form of social action is derived from the primary action of all associations and organizations, the assembly or meeting of a group of individuals to promote their common interests. Indeed, union activities consist, primarily, of a series of meetings of the individual members. It is in either committee meetings, local union meetings or meetings of the national union that common problems of employment are discussed and decisions made. In the meetings grievances are disposed of, subject matters of collective bargaining are determined, working agreements made by union agents are accepted, and matters of local and national policy are decided upon. Labor organizations, like religious organizations and political associations,

are simply groups of individuals gathered and assembled together for the more effective exercise, through joint action, of the constitutional rights to which each individual is entitled and may lawfully exercise.

Thus, it was that this Court, in *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U.S. 1, at 33, was able to say that "the right of employees to self-organization is a fundamental right," and, more specifically, to say in *Thomas v. Collins*, supra:

> "Lawful public assemblies, involving no element of grave and immediate danger, to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers. *And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.*" (323 U.S. at 539.) (Emphasis supplied.)

And thus it was that the Sixth and Seventh Circuits have both concurred in the proposition that the right of workers to assemble into labor organizations is a right protected under the First Amendment. *N.L.R.B. v. Budd Manufacturing Co., supra; Inland Steel Co. v. N.L.R.B., supra.*

The true value of this right of workingmen to assemble into labor organizations for purposes of mutual aid and protection is best seen when it is realized that under the Constitution the founding fathers created a society of free men. As applied to workingmen, this concept of freedom, as distinguished from slavery, elevates to the highest constitutional level the right of workingmen to assembly into labor associations. As applied to the right of businessmen to assemble, the concept of freedom has no such implications (see pp. , *infra*). The facts of economic life and the conditions of industry, which made recognition of this right of workers the indispensable prerequisite to the existence of a society dedicated to the ideal of "completely free

and voluntary labor" as opposed to slavery and involuntary servitude, had early been noted in the decisions. In *Holden v. Hardy*, 169 U.S. 366, 397, the Supreme Court observed that individual employees had, as a practical matter, no voice in determining the terms and conditions of their employment. "The employer simply notifies the worker what wages he [is] to get and the hours he [is] to work." The employees, in turn, the court saw, "are practically constrained to obey." By 1921, in *American Steel Foundries v. Tri-City Central Trades & Labor Council*, 257 U.S. 184, 209, the Court observed:

> "A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment."

The fact that employees acting individually and alone are helpless to deal on a basis of equality with their employers concerning the terms and conditions of their employment; the fact that only by organizing for the purpose of collective bargaining can employees obtain a voice in fixing the wages and hours and other conditions of work; the fact that "When the master can compel and the laborers cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." (*Pollock v. Williams*, 322 U.S. 4, 18), a condition characteristic of a slave, not a free, society; these facts dictated that no government, under the Constitution, could be deemed to have power to preclude employees from combining in labor organizations for the purpose of achieving equality of bargaining power and bargaining collectively with employers.

We believe, therefore, that the right to form and maintain unions is a fundamental right specifically protected under the guarantee of the right of assembly in the First Amend-

ment. The question in this case is whether union membership as a condition of employment is, in the absence of some equivalent statutory protection of the right of union organization, an essential and necessary element of that right. If it is, then it is indispensable to the exercise of the constitutional right to form unions. If it is, then the statutes at bar are unconstitutional abridgments of that right under the principle "You take my house when you do take the prop that does sustain my house; you take my life when you do take the means whereby I live." We propose to prove that it is, by experience, analysis and legal doctrine. When considering such proof, it should be remembered that "In approaching cases, such as this one, in which Federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect." *Oyama v. California*, 332 U.S. 633, 636.

## B. Union Membership as a Condition of Employment is Indispensable to the Exercise of the Right of Workmen to Assemble in Union.

### 1. Proof of Indispensability by Experience and Economic Necessity.

Historical experience demonstrates that the refusal of union members to work with non-members, and the consequent making of union membership a condition of employment, were and are at the heart of workmen's associations.[5]

Constitutional rights are not derived from abstract doctrines but from the concrete experience of our people. The Constitution protects the vital personal liberties necessary to our form of government. Experience is the proof of necessity. If a body of Americans has persistently, in the face of the greatest obstacles, legal, social and economic, remained attached to certain practices in the exercise of

[5] A full account of this history is presented in the Economic Brief of the American Federation of Labor, pp. 5-9.

their freedom, then these practices may claim constitutional protection. We do not say that fixed habits and ways of exercising rights are beyond legislative regulation simply because they are ancient, but that there is in established practice an expression of fundamental right which, though it may be regulated, cannot be destroyed or abridged. *Murdock v. Pennsylvania,* 319 U.S. 105, at 110. This Court decided there that the free distribution of religious leaflets was indispensable to freedom of religion because it was an "age-old" religious practice.

> "The hand distribution of religious tracts is an age-old form of missionary evangelism as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various sects * * * "
>
> "We hold only that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." (319 U.S. at 108, 110.)

Cf. *H. J. Heinz Co. v. N.L.R.B.,* 311 U.S. 514, where this Court relied upon the history of the collective bargaining process and experience under it as showing that the obtaining of a written, signed agreement was indispensable to bona fide collective bargaining.

The refusal to work with non-union employees is "coeval with trade unionism itself." Webb, *Industrial Democracy* (London, 1897) p. 214. Historically, unions were local clubs or societies of workmen who joined in an association and agreed to certain common rules under which the members of the society would offer their services to employers. The crux of the association lay in the elimination of competition among its members. Formerly, unions were outside the law; they did not secure collective agreements from employers, nor were there any statutes protecting collective bargaining. The common rules, governing wages and

conditions of work, were enforced through the disciplinary powers of the association, and in order to make them effective it was obviously necessary that all workmen who could compete with association members should belong to the association. To secure this end, to induce competing workers to join the association, and thereby to protect their society and to enforce its rules, it was the unfailing usage of the society to agree that members would not work with non-members and that they would notify employers accordingly.[6]

We quote from our Economic Brief (pp. 7-11):

> "The Cordwainers of Philadelphia, who set up their first permanent organization in 1794 and other cordwainers' societies at the outset adopted a rule that the employer should retain none but society men in his shop * * * By 1840 it became quite common for unions to adhere to rules whereby any union members were prohibited from working with non-union workers regardless of what wages the latter might be paid. This is illustrated by the following clause in the constitution of the Baltimore Typographical Society of 1842: 'Every person working at the business will be required to make application to join this Society within one month from the time of his commencing work in any office in the city * * * on the refusal or neglect to comply with the regulations contained in the foregoing sections, or in the case of the rejection of the application * * * the members of this Society shall refuse to work in any office where such person may be employed.' * * * In addition to the printers, Dr. Stockton's thorough study lists the following unions which adhered to this practice before the Civil War:
>
> "Journeymen Cordwainers, Journeymen Carpenters, Cigar Makers, Journey Tailors, Hollow Ware Glass Blowers, Iron Molders, Journeymen Hatters, Shoe Makers, Benevolent and Protective Association of United Operative Mule Spinners of

[6] See the collection of early judicial records proving the universality of this usage. E. E. Witte, *Early American Labor Cases*, 35 Yale L. J. 875; Nelles, *Commonwealth v. Hunt*, 32 Col. L. Rev. 1128; Nelles, *The First American Labor Case*, 41 Yale L. J. 165.

New England, Carpet Weavers, Stone Cutters, the Potters, the Iron, Steel and Tin Workers, and the Longshoremen.

"Summing up, Dr. Stockton states: 'If the available evidence is summed up, it may be said that practically every trade union formed prior to the Civil War was in favor of excluding non-members from employment.'"

Thus, unionism in its primitive state of local associations of craftsmen reveals the basic elements necessary to the exercise by free workers of their right to assemble into economic associations. The refusal to work with non-unionists is one of these indispensable elements.

The subsequent history of the American trade union movement has elaborated upon this element but never obscured its essentiality. (See Economic Brief, pp. 4-19.) The first national unions were formed after the Civil War. Beginning about 1870, according to Dr. Stockton: "The National Unions, or a very large part of them made the maintenance of the closed shop a national rule, and required the local organizations to enforce it as effectively as possible." (Cited in Economic Brief at p. 19.)

In these early days, unions did not enjoy the benefit of contracts with employers. The practice was to give the employer notice of the union rule against working with non-unionists. See *Commonwealth v. Hunt*, discussed *infra*. But as contracts came to be executed to avoid disputes, the employer recognized the union rule and agreed to hire only union members. See *Jacobs v. Cohen*, 183 N. Y. 207, 76, N.E. 5. The older the union, the more secure was the provision in the contract with the employer, because the rule of common union membership had been already established prior to the agreement. Old craft unions which, in the course of time, had made union membership a part of learning the trade, as common as the tools of the trade or its work habits, enforced their rule by a "closed-shop" contract with employers. This contract provision obligates the employer to hire through the union or to hire only persons who are, at the time of hiring, union members.

Preferential hiring is a minor variation, requiring the employer to prefer union members. Industrial unions were satisfied to secure a "union-shop" agreement under which the employer is free to hire whom he wishes, but all employees are obliged to become members of the union shortly after hiring, and to remain members in good standing thereafter. During World War II, a new contractual arrangement was devised, namely, maintenance of membership. In this arrangement, an employee is free not to join the union, but if he does, he is to remain a member for the life of the collective agreement between the union and the employer. (See Economic Brief, pp. 1-4, for an explanation of the foregoing terms.)

In one of these four forms—closed shop, preferential hiring, union shop, maintenance of membership—union membership has become a condition of employment for twelve million workers. (See U. S. Dept. of Labor, *Extent of Collective Bargaining and Union Recognition*, 1946, reproduced in No. 34, at R. 51.)

This number represents 75% of all workers covered by union agreements. Idem. Thus, union membership as a condition of employment in some form has been a characteristic, age-old element of union organization; it is today an integral part of our industrial society.

Like the principle of self-organization itself, the principle of union membership as a condition of employment arose out of the necessities of the situation; economic factors induced, indeed compelled, adoption of the principle as an indispensable concomitant, an integral part of effective unionization. As this Court pointed out in *Pollack v. Williams*, 322 U.S. 4, when a single person labors for wages and under conditions which he lacks adequate bargaining power to improve, the "resulting depression of working conditions and living standards affect not only the laborer under the system, but every other with whom his labor comes in competition." So it is with the single non-unionist employed in a shop where the remainder of the employees

are members of the union. The refusal of the non-unionist to lend support to the union's demands, to assist in maintenance of union conditions, to participate in its activities, affects not alone his own working conditions but those of every union member in the plant. The demand of unionists that, as a condition to their employment the employer hire only union members, is not an offensive measure directed at restriction of the liberty of the non-unionist but rather a defensive measure directed at the preservation of equality of bargaining power and attainment of the very objectives which the guarantee of the right to organize is intended to promote. All history and experience teaches that the obtaining of union-security agreements is the only practicable means available to workers for maintaining bargaining power and hence labor standards within single shops or within industries.

This Court has recognized that "in order to render a labor combination at all effective it must eliminate the competition from non-union made goods." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502-504. It is for this and other reasons discussed herein that "A closed shop is the ultimate goal of most union endeavor." Justice Jackson dissenting in *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248, at 267. To deny to those employees who seek to obtain a voice in their industrial life through organization the essential means of making the voice and power of their organization effective, i.e., by requiring common union membership, is to deny them the right to organize itself. Compare Frankfurter and Greene, *The Labor Injunction*, p. 205, where it is stated "• • • the right of combination by workers [for, *inter alia*, union security] is itself a corollary to the dogma of free competition, as a means of equalizing the factors that determine bargaining power • • •."

It is at precisely this point that distinction exists between the protection accorded by the First Amendment's guarantee of freedom of assembly as it applies to business associations on the one hand and to labor organizations on the other. The guarantee of freedom of assembly protects

the right of businessmen to form associations for lawful purposes. But it does not guarantee or protect the right of businessmen to utilize their association for purposes of price fixing or of eliminating competition between business managers. Those purposes need not be deemed lawful because price fixing is not, itself, an objective to which the Constitution lends sanction in a free enterprise society. Business thrives or can thrive under competition between businessmen; workers cannot thrive but can only die under competition between themselves. For workers throughout a trade or industry are, as a group, engaged in competition with businessmen for a fair share of the products of industry. Unless workingmen are free to combine and eliminate competition among themselves, they cannot effectively engage in competition with employers. The objective of our society that labor be free requires that workers be permitted to take collective action necessary to enable them to attempt to improve wages, hours and working conditions. *Pollack v. Williams, supra.* Therefore, the objective of workers to eliminate non-union competition cannot be made unlawful. On the other hand, no constitutional objective exists which requires that businessmen be permitted to combine effectively for the purpose of maximizing profit. Thus, the exercise by workingmen of freedom of assembly, to have real meaning, must comprehend the right to eliminate wage competition between individual employees and to require adherence to the common rule through the device of union membership as a condition of employment, whereas in the case of businessmen it will not include the right to combine to eliminate price competition.

A historical proof of the inseparability of union-security agreements to effective exercise of the right to self-organization is offered by the fact that the attack upon unions always centers on this element. Employer resistance to unions was first organized at the turn of the century and its rallying cry was the "Open Shop." The "open shop" permits the employment of non-union men who are not

bound to work at union terms and through whom the employer can defeat the objective of organized workers to achieve equality of bargaining power by pitting the union and non-union workers against each other. Since the 1900s the attack on unionism has continued to center on this element. During times of national crises, in the First and Second World Wars, when it was necessary to secure the confidence of workers, and when external danger to the Nation enforced a truce to domestic quarrels, the resistance to membership as a common term of employment was reduced. But after the First World War, employers resumed their attack upon the closed shop.[7] Today, the right of workmen's associations to make membership a necessary and common incident of employment is again under attack. The attack this time has taken the form of laws enacted in several States, where, it can fairly be said, union members are a minority of the civil population. The enactment of these laws in several States does not prove their validity; it proves instead that the long uphill struggle of workmen to exercise constitutional rights is not at an end.

Judicial recognition of this indispensability of the union-security principle to the very existence of labor organizations has many times been made. The Supreme Court of Illinois states in *Kemp v. Division* 241, 255 Ill. 213, 99 N.E. 389, at 394:

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[7] It is the plain and demonstrable fact that the open shop means low wages and insecurity for workers, and the union shop high wages and security; there is a direct and positive correlation between the incidence of union shop agreements and wage rates. The results of the great open shop drive of the 1920's in lowering wage rates and eliminating purchasing power, leading directly into the great depression of the '30's, is a classic example. Similar results obtain no matter what the era (Economic Brief, p. 13, et seq.). Available studies in every field, of which the study of the relationship between wage rates and union shop conditions in the coal industry and the indispensability of the union shop in removing the traditional north south wage differential, is the most striking, indicates this close correlation. See Economic Brief, pp. 21-37. Time and again it has been demonstrated, that only through eliminating the wage competition of the non-union workers can wage standards be maintained, and it is only by the use of union security agreements that such elimination can, as a practical matter, be accomplished.

"• • • If it is proper for workmen to organize themselves into such combination as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. • • • "• • • To deny them the right to determine whether their best interests required that they should be associated in their work only with members of their organization would imperil their very existence." (At 396.)

And in *McKay, et al. v. Union*, 16 Calif. (2d) 311, 106 Pac. (2d) 373, at 381, the California Supreme Court described application of the union-shop principle as follows:

"• • • 'The defendants were seeking, in all they are shown to have done, to secure employment by the plaintiff for themselves, to the exclusion of those not associated with them, and to secure that employment upon terms deemed satisfactory or advantageous to them. That is the effort of every dealer in goods. It is the struggle of competition, and is no more frowned upon where the subject of trade is labor than where it is a specific commodity.' • • •

"The interest of the defendant unions in the present controversy is direct and obvious. The closed union shop is an important means of maintaining the combined bargaining power of the workers. Moreover, advantages secured through collective action redound to the benefit of all employees whether they are members of the union or not, and members may resent non-members sharing in the benefits without liability for the obligations. Hence a closed shop policy is of vital importance in maintaining not only the bargaining power but also the membership of trade unions. These considerations serve to justify the defendants' conduct as much against the complaints of non-member employees as against complaint of an employer."

See also cases set forth in Appendix F to Economic Brief.

The present status of union membership as a condition of employment, its ancient usage, the economic factors giving rise to the institution in the first place, all denote that it is indeed an indispensable constituent of the right of workers to self-organization and deserves equal protection if that right is to be effective.

2. Proof of Indispensability by Analysis of the Nature of Unions and Analogy of Duties of a Worker in an Industrial Unit to Those of a Citizen in a Political Unit.

An analysis of the nature of unions will confirm the fact of experience; that union membership must be permitted to be a term of employment, unless, perhaps, the collective regulation of working conditions is supervised by law. It is the nature and function of unions to establish common rules for the employment of workers in like employments. We have come to call this function "collective bargaining," but collective bargaining is only one phase or aspect of the relationship. Historically, there was a period when unions did not secure contracts, and the common rules were enforced solely through the power of their association.

The need for common rules of employment is not created by unions; it is created by the nature of any economic enterprise which employs a number of individuals in a joint effort. The work of a number of persons must be governed by rules which determine the part of each individual in the joint effort. There is a government of some nature in any economic enterprise. Some work rules have been fixed by the State, such as maximum hours, minimum wages and other measures of health and safety; more rules are fixed by employers; a few by unions alone; and many by negotiation between unions and employers. If the union does not fix or help fix common rules of wages, hours and other working conditions, the employer will and does alone. The employer may wish to vary the rules in his discretion to suit his needs or advantages, but this arbitrary power of variation and discriminatory application of the common rules affronts the sense of justice and spurs men into forming unions. The common rule and its fair and uniform application provide the foundation of law and justice in the relations between employer and employees. Participation by unions in the formulation and administration of the common rules is essential to democracy in economic life.

When the State fixes all the rules, there is no freedom for either employers or employees; the State is then a totalitarian authority excluding any private organizations having powers of self-government. When the employer fixes and administers the rules in his uncontrolled discretion, the employees are like subjects of an absolute monarch.

The individual worker, except in rare cases, does not fix terms of employment to suit himself. He is, almost always, employed under the common rules fixed by the State, the employer or the union.

Because collective bargaining involves transference from each individual worker to the group as a whole of the right to determine the wages, hours and working conditions which shall obtain in the particular employment, and because in collective bargaining the wages, hours and working conditions which obtain apply equally to all who are employed in the enterprise, the rights of the individual worker under collective bargaining become analogous to those of a citizen in a political unit. The worker becomes a member of an economic society when he takes employment. The necessity of viewing the problem of the individual workers in relation to union membership as a problem characteristic of the society of workingmen as a group rather than as a purely individual matter was foreshadowed by Mr. Justice Jackson in his concurring opinion in *Thomas v. Collins*, 323 U.S. 516, at 546. He pointed out that:

> "The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative democratic processes bring to the nation. Their smaller society, too, must choose between rival leaders and competing policies."

It is the society of his fellow workers in a mine, mill or shop, in a craft or calling. The union is the organization or government of this society, formed by the exercise of the right of association. It is essential to the nature of this organization that it include every individual who is a mem-

ber of the society which it governs. Union membership as a condition of employment is thus itself a common rule of employment, insuring equality and non-discrimination, as does a uniform wage rate or fixed work day. It is, however, unique because it is essential to the maintenance of these other rules. At least in the absence of a statute which protects the common rule, common union membership is indispensable to a democratic society of workers, based on law and justice. When union men, since the days of their pioneer organizations, made the refusal to work with non-unionists a cardinal point in their philosophy, they were responding to the necessities of their situation. Their right to free association is abridged and threatened with destruction when this connection with reality is outlawed.

3. The Proof of Indispensability by Legal Doctrines.

*(a) Recognition of the right to self-organization precludes the view that labor organizations, in requiring union membership as a condition of employment, are engaged in unlawful assemblies.*

*Commonwealth v. Hunt*, 45 Met. (Mass.) 111, decided in 1842, is one of the great landmark decisions in American labor law. Nelles, *Commonwealth v. Hunt, supra*. The ruling acquitted unions of the charge that they were an unlawful conspiracy. It is especially relevant here because the gist of the case was the legality of a union rule that members of a society of craftsmen would not work with non-members. The prosecution charged that this rule and its effect as a condition of employment were proof of an unlawful assembly. The defendants, the indictment read,

> "being workmen and journeymen in the art and manual occupation of bootmakers, unlawfully, perniciously and deceitfully designing and intending to continue, keep up, form and unite themselves into an unlawful club, society and combination, and make unlawful by-laws, rules and orders among themselves, and thereby govern themselves and other workmen in said art, and unlawfully and unjustly to extort great sums

of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did then and there unjustly and corruptly combine, confederate and agree together, that none of them should thereafter and none of them would, work for any master or person whatsoever, in the said art, mystery or occupation, who should employ any workman or journeyman, or other person, in the said art, who was not a member of said club, society or combination, after notice given to discharge such workman from the employ of such master; to the great damage and oppression, not only of their said masters employing them in said art and occupation, but also of divers other workmen and journeymen * * * to the evil example of all others in like cases offending, and against the peace and dignity of the Commonwealth." (45 Met. at p. 112-113.)

Chief Justice Shaw characterized this charge:

"Stripped then of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this; that the defendants and others formed themselves into a society and agreed not to work for any person, who should employ any journeyman or other person not a member of such society, after notice given to him to discharge such workman." (45 Met. at p. 128.)

That a union seeks to be all-inclusive is "manifest." The Chief Justice wrote:

"The manifest intent of the association is, to induce all those who engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones." (45 Met. at p. 129.)

It is the abuse of this power which alone may be condemned, not the power itself, the opinion holds. The association and its rule, making union membership a condition of employment, are legal on "established principles":

"* * * that every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or

individual, at his own option except so far as he is bound by contract." (45 Met. at p. 133.)

The prosecution relied heavily on the fact that the union had procured the discharge of a workman, one Horne, by his master, Wait. This was, the indictment charged, unlawful compulsion upon others. It was not, the Court held:

> "But whatever might be the force of the word 'compel,' unexplained by its connexion, it is disarmed and rendered harmless by the precise statement of the means by which such compulsion was to be effected. It was the agreement not to work for him, by which they compelled Wait to decline employing Horne longer." (45 Met. at p. 133.)

Horne, it will be noted, "had been a member; his troubles with the society seem to have commenced when he did extra work on a pair of boots without charging for it." Nelles, *op. cit., supra,* 32 Yale L. J. at 1132. He was expelled for violating a common rule of the society.

Many years later but still long before the right of self-organization was found to have any constitutional sanction, Justice Holmes, when sitting as a member of the Supreme Judicial Court of Massachusetts, found occasion to especially concur with the reasoning of Chief Justice Shaw in *Commonwealth v. Hunt.* In his dissent in *Vegelahn v. Guntner,* 167 Mass. 92, 44 N.E. 1077, 35 L.R.A. 722, 57 Am. St. Rep. 443 (1896), he restated the principles of the *Hunt* case as follows:

> "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way . . .
>
> "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor; just as capital may combine with a view to getting the greatest possible return, it must

be true that, when combined, they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion today. I feel pretty confident that they equally will abandon the idea that an organized refusal by workingmen of social intercourse with a man who shall enter their antagonist's employ is wrong, if it is dissociated from any threat of violence, and is made for the sole object of prevailing if possible in a contest with their employer about the rate of wages. The fact, that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist, does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose, and with the effect, of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842 by the good sense of Chief Justice Shaw, in *Commonwealth v. Hunt*, 45 Met. 111."

Today, when the right to self-organization is recognized to have constitutional sanction, when the function of labor unions in making and enforcing common rules is deemed indispensable to exercise of that right, when the collective action of workers to improve their material conditions is no longer deemed constitutionally on a parity with collective action of businessmen to fix prices, the decision in *Commonwealth v. Hunt* could be predicated on constitutional as well as common law grounds.

*(b) The right to self-organization for purposes of collective bargaining necessarily includes right to enforce common rules of employment as against individual employees.*

In modern times, the society of bootmakers involved in *Commonwealth v. Hunt, supra*, is a shoeworkers' union, and it formulates the common rules in collective bargaining

with employers. As has been indicated above, it is inherent in the nature of collective bargaining, and a condition of its success, that the common rule shall govern all individual employments. The National Labor Relations Act, while it supports this view, does not elaborate on its nature; but this Court has done so in a series of decisions. *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332; *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 343; *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678; *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Engineers*, 323 U.S. 210 (companion to Steele case; *Railway Mail Ass'n v. Corsi;* 326 U.S. 88; *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, rehearing, 327 U.S. 661.

The analysis which we have endeavored to set out in this portion of our brief is, we think, fully recapitulated in the opinion in *J. I. Case v. N.L.R.B., supra*. In that case, it will be recalled, the employer had entered into individual contracts with each employee. The contracts did not forbid union membership, nor were they, it was conceded, procured through unfair practices by the employer. Subsequent to their execution, a union won an N.L.R.B. election and with it the statutory right to act as exclusive representative of all employees and to bargain collectively with the employer. The latter insisted that it could not make any bargain with the union which in any way altered the individual contracts, and that it would bargain with the union only on matters not covered by these agreements. But the Court held that these individual contracts had no effect, once the majority of the employees had decided in favor of collective bargaining. It was not a matter of contract, the Court explained, but of certain peculiar features of common action by a group of employees:

> "Collective bargaining between employer and representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one

has a job by reason of it and no obligation to any individuals ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit.

"After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and, except that he must engage in no unfair labor practice or discrimination,* is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring.

" * * * An employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement, and may not waive any of its benefits, any more than a shipper can contract away the benefits of filed tariffs, the insurer the benefits of standard provisions, or the utility customer the benefit of legally established rates." (321 U.S. at 334-336.)

The Court then went on to explain that there are situations in which individual contracts are operative and gives

*Union membership is not discrimination but a common uniform term like rates.

as examples situations where there is no collective bargaining agreement. But once the void is filled, the individual contracts lose their force.

"Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit, nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. . . . Wherever private contracts conflict with its function, they obviously must yield or the Act would be reduced to a futility . . .

"It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employees otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

"But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than collective agreement, but we find the mere possibility that such agreements might be made no ground for holding that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where

there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours and expressly leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole * * * The workman is free, if he values his own bargaining portion more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones * * * We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement * * * But in so doing, the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by the collective agreement." (321 U.S. at 337-339.)

In the case of *Order of R.R. Telegraphers v. Railway Express Agency, supra*, the individual contracts were made after a collective agreement had been reached. The employer, in this case, notified certain of its employees of a new wage rate and requested their consent to it. They gave it under protest, but their union brought action under the Railway Labor Act to set aside these individual contracts and the Court held them invalid, even assuming, it said, that they were voluntarily reached:

"The Company contends that special voluntary individual wage contracts as to rates of pay, rules and

> conditions of employment may validly be made, notwithstanding the existence of a collective agreement, and that the terms of the individual agreements supersede those of the collectively bargained one. If this were true, statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually. • • • *Collective bargaining was not defined by the statute which provided for it, but it has generally been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States. From the first the position of labor with reference to the wage structure of an industry has been much like that of carriers about rate structures.*" (321 US. at 346.) (Emphasis supplied.)

The decision in *Medo Photo Supply Corp. v. N.L.R.B., supra,* reached the same result under the National Labor Relations Act.

The doctrine of these decisions is that the union establishes, through collective bargaining, the common rules which govern *all* employees in a given unit. These common rules prevail over any individual agreements. In *Elgin, Joliet and Eastern R.R. v. Burley, supra,* the Court held that though individual employees each secure vested rights under the common rules, the union sees to their uniform administration and interpretation. The majority in that case held that individual members could choose their own representative in prosecuting an "accrued monetary claim"; the minority held that the union was the exclusive representative for this purpose. But this Court unanimously agreed that there must be a uniform application of the common rules. The majority said:

> "To leave settlements ultimately to the several choices of the members, each according to his own desire without regard to the effect upon the collective interest, would mean that each affected worker would have the right to choose his own terms and to determine the meaning and effect of the collective agreement

for himself. Necessarily, the carrier would be free to join with him in doing so and thus to bargain with each employee for whatever terms its economic power, pitted against his own might induce him to accept. The result would be to make the agreement effective, not to all alike, but according to whatever varied interpretations individual workers, from equally varied motivations, might be willing to accept. To give the collective agent power to make the agreement, but exclude it from any voice whatever in its interpretation would go far toward destroying its uniform application." (325 U.S. at 737, n. 35.)

The minority was emphatic:

"To permit any member of the union to pursue his own interest under a collective agreement undermines the very conception of a collective agreement." (325 U.S. at 758.)

The common rule of collective bargaining carries with it the legal doctrine that the union is the common authority or government of a society of workers. It has in a sense the powers and responsibilities of a government. It must treat all members of the society it governs as if they were members and deal with them fairly under common rules.

That is the decision of this Court in *Steele v. Louisville and Nashville R. Co., supra.* In this case, the union was the statutory bargaining agent of a craft or class under the Railway Labor Act. Negroes were members of the class, though they were denied membership in the union. The union entered into agreements with several carriers assigning jobs to white workers by depriving negroes of their seniority rights secured by prior collective agreements. The State court had held that the union was free to make any bargain, but said this Court:

"We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. • • • Congress has seen

> fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, see *J. I. Case Co. v. Labor Board*, *supra*, but it has also imposed on the representative a corresponding duty . . . to exercise fairly the power conferred upon it. . . . Wherever necessary, to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action." (323 U.S. at 202-204.)

Whether an individual is a member or not, he is bound by the common rules, but the union owes him the duty of fair and equal treatment. It must, this Court said in the Steele case, afford him the opportunity to participate in the formulation of the common rules. It follows that membership is a right as well as a duty. That is the legal doctrine of the *Railway Mail Ass'n v. Corsi*, *supra*, upholding the legality of a state statute prohibiting a union, not from requiring membership, but from denying it on account of race, color or creed:

> "To deny a fellow employee membership because of race, color, or creed, may operate to prevent that employee from having any part in the determination of labor policies to be promoted and adopted in the industry and deprive him of all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees, whether union members or not." (326 U.S. at 94.)

We can summarize the nature of union membership as a common condition of employment in an industrial society by again comparing it to citizenship in a political society. Both are compulsory upon individuals. In each case the compulsion is justified because it is assented to by most of the members. Cf. *West Virginia State Board of Education v. Barnette*, 319 U.S. at p. 641. And it has been found by human experience to be indispensable to the preservation

of any society. The liberty of the individual is not the right to license, but participation in a social organization founded upon equality, justice and law. The union is that organization for employees. It is the product of the exercise of their right of assembly, and it is essential to the exercise of their right to secure equality of bargaining power with employers, that membership in the union be a common condition for all who are in fact members of the group governed by the union. To deny labor organizations the right to require adherence to the common rule and to require participation in the making of such common rules through the device of the union-security agreement whereunder union membership is made a condition of employment is to ignore the nature of our industrial society, to disregard the philosophy of the *J. I. Case Co.* case, *supra*, and the related decisions of this Court discussed above, and to destroy the very foundation of modern unionism.

It will be argued that the comparison of unions to governinent hangs upon statutes which empower the majority union to be the exclusive representative of all the employees in a unit. Thus it will be pointed out that the decision in *J. I. Case Co. v. N.L.R.B.* rested upon the National Labor Relations Act; and the *Steele* case upon the Railway Labor Act. But these statutes did not create the right of workers to self-organization for purposes of collective bargaining. They merely gave it statutory protection. *N.L.R.B. v. Jones & Laughlin Steel Company, supra; Amalgamated Utility Employees v. Consolidated Edison Co., supra. Order of Railroad Telegraphers v. Railway Express Agency, supra.* The incidents of the right are precisely the same whether it is being protected against governmental or against private interference. *N.L.R.B. v. Budd Manufacturing Co., supra; Inland Steel Co. v. N.L.R.B., supra.*

It will be further argued that the statutes which protect the right to self-organization do not make union member-

ship a condition of employment; that, on the contrary, this condition was permissive only under the old National Labor Relations Act; it is restricted under the amended National Labor Relations Act, and it has been prohibited altogether under the Railway Labor Act. One answer to this argument is that the statutory scheme protecting the right of organization and granting exclusive representation to the majority union established in these Acts affords at least a near equivalent of union membership as a condition of employment. Under the doctrine of *J. I. Case Co.* every term and condition of employment is governed by the common rules. Under the doctrine of the *Steele* case, each employee must be given an opportunity to participate in the making of the rules. These conditions are the essence of union membership as a condition of employment.

We are not called upon here to weigh the exact equivalence of a statutory scheme and exercise of constitutional rights unaided by statute. Even when the collective agreement is legally enforceable as in New York State, the enforcement of the common rules depends upon the power of union discipline. During the depression years, wage standards of plumbers in New York City were being undercut by certain union journeymen. Several enforcement measures were tried in vain; the union's disciplinary powers proved to be the only effective means of enforcement. *O'Keefe v. Local 463,* 277 N.Y. 300, 14 N. E. (2d) 77.

The original National Labor Relations Act left union membership permissive, as it did the making of other terms, and conditions of employment. Under that Act, union membership became a condition of employment in the course of collective bargaining protected by the Act. The amended Act at least permits a restricted form of union membership as a condition of employment. The Railway Labor Act prohibits an employer from making any change in any

existing condition of employment without negotiation with the exclusive representative of the employees involved. It contains a more comprehensive system for the protection and regulation of common rules than is to be found in either the old or new National Labor Relations Act. Hence, its prohibition of union membership as a condition of employment was accepted by unions in return for its stringent protection of their organizations and common rules.[9] The State statutes before this Court offer no such protection; they flatly prohibit any form of union membership as a condition of employment; and in none of these states is there any statutory protection for union organization or common rules of employment.

These statutes are defended as independent exercises of the powers reserved to the States to deal with labor relations. (See opinion of State Court in *Whitaker v. North Carolina*, No. 34, n. 34, R. 63-64.) Their only connection with federal law is that in so far as they may regulate labor relations affecting interstate commerce, the amended National Labor Relations Act by Section 14 (B) interposes no bar to the exercise of independent state regulation. Moreover, statutes regulate purely local labor relations to which the right of self-organization is just as fundamental and as well protected by the First and Fourteenth Amendments as in the case of labor employment in interstate commerce. The North Carolina case, as the record shows, involves "local building construction and repair." (Ibid. No. 34, Tr. 14.) The Arizona case involves a union-shop agreement with an employer engaged solely in intrastate commerce (No. 27, R. 21).

These statutes, therefore, stand on their own; within their respective states they are the only statutory regulation of the right of workmen to self-organization. It cannot be denied that these statutes trench upon a vital element of

[9] That even this protection has not proved a real substitute for the union-security principle is shown in Economic Brief, pp. 66-80.

union organizations. Union membership as a condition of employment is proved by experience, by the nature of employment, by legal doctrine, to be essential to unions. A statute which flatly prohibits this element seriously and adversely affects the exercise of the right to self-organization. It eliminates (absent protections afforded by such enactments as the Railway Labor Act) the only known means for enforcing the common rule, inherent in any association of workers. It destroys the power of employees to achieve, by collective action, equality of bargaining power with employers. It can be justified only by the existence of a clear and present danger to the public welfare, and not by attempting to recognize or create and protect an alleged right to work as a non-unionist, or by claiming to prevent alleged "monopolies" in labor said to arise from union-shop agreements. The inadequacy of these two principal justifications for the outlawing of the union-security principle will be discussed in the next portion of this brief.

### C. The Statutes Prohibiting Union Membership as a Condition of Employment in Any Form Cannot Be Justified as a Protection of an Alleged "Right to Work" or as a Means of Preventing an Alleged "Monopoly of Labor" or on Other Grounds.

These laws, it is said in their support, restore equality between union and non-union workers. An individual has a right not to join a union equal to his right to join. If it is constitutional to prohibit an employer from making non-membership a condition of employment, it is equally constitutional to forbid making membership a condition of employment. In any event, the right to work is a proper subject of state protection. The proponents of the enactments, as did also the courts below, relied heavily on this reasoning. See No. 27, R. 120; No. 34, R. 78; No. 47, R. 57. It is necessary to determine whether these arguments are sound and what are their implications.

1. THE ENACTMENTS HERE INVOLVED DO NOT PROTECT OR CREATE A "RIGHT TO WORK" IN THE ABSTRACT; UNION-SHOP AGREEMENTS DO NOT DENY THE RIGHT TO WORK IN ANY ABSOLUTE SENSE.

Two of the enactments, those of North Carolina (No. 34) and Arizona (No. 27) outlaw union-security agreements under the guise of according protection to the "right to work." But, of course, neither these, nor the Nebraska amendment, either protects or creates any such right. The Constitution, which does not even purport to regulate the conduct of private individuals, imposes no duty upon any private employer to give employment to anyone. Certainly, absent contract, no man has a "right to work" for any specific employer, or at any specific job. As stated by Justice Brandeis in *Senn v. Tile Layers Protective Union*, 301 U.S. 468 at p. 482, "A hoped for job is not property guaranteed by the Constitution, and the diversion of it to a competitor is not an invasion of a constitutional right." Nor has it yet been held that the States are, by the Constitution, required to provide employment opportunities for all who are willing and desire to work. No such rights are created by the enactments in question. These laws do not require any person to employ anyone. No employee is guaranteed any job, much less any specific job. Nor are these laws concerned with expansion of employment opportunities for workers as a group, or for workers possessing any particular skills. These laws do not undertake to deal with any practices by either employers or by labor organizations which restrict the number of employees in industry. They apply despite the fact that the same number of jobs are and will be available to qualified applicants under these laws, as were available prior to their enactment.

Indeed, in so far as at least two of the cases presently before this Court are concerned, the laws apply regardless of whether all of the employees covered by the union-shop contract in question may have voluntarily agreed to such contract and to maintain union membership during its

term. In the Nebraska case the agreement requiring union membership had in part been approved by a unanimous vote of the group (No. 47, R. 11).

In the North Carolina case, the employer had been engaged in the business of local building construction and repair for thirty years (No. 34, R. 14) and he had always been a "union contractor * * * employing nothing but union labor" (No. 34, R. 9). There was no showing that persons had ever sought employment from Whitaker unless he was a member of the union. It was testified that every prospective employee knew of this condition (No. 34, R. 10), and so far as appears from the record, this was accepted as one of the common conditions of employment with Whitaker.

These statutes are thus being applied to situations where the contractual condition that each employee shall be a union member is a rule agreed to by the workers involved; no one has been "forced" to join a union as a condition of employment.[10]

Nor can there even be pretense that the enactments are directed at the hypothetical situations in which qualified and willing applicants are denied the opportunity to become union members by virtue or arbitrary or unreasonable membership qualifications or excessive initiation fees. For these laws apply regardless whether, as in these cases, membership in the union is open to all applicants on reasonable terms; or not.[11]

Since opportunity to accept or continue employment in enterprises covered by closed-shop contracts is denied only

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[10] It is extremely interesting to note with respect to the oft repeated contention that, under union-security agreements, workers are forced to join unions, that experience in the holding of union-shop elections under Section 9(e) of the Taft-Hartley Act shows that workers voted for a union-shop agreement in 97% of all elections and by a 93.5% majority. See *Monthly Statistical Summary*, National Labor Relations Board, August 1947-September 1948, inclusive.

[11] We are, therefore, not concerned in this case with statutes which, by regulating union admission or expulsion rules and practices, seek to protect the right of employes to join labor organizations. See *infra*, p. 103.

to those who voluntarily choose to refuse to join the union, it cannot be said that these contracts impinge upon the right to work in any absolute sense. Where the enjoyment of rights is conditioned upon compliance with reasonable conditions, individuals who voluntarily refuse to comply with such conditions are not being deprived of those rights. *National Maritime Union v. Herzog*, 334 U.S. 854. A situation parallel to that existing under closed-shop contracts is that which exists in States which have adopted the system of an integrated bar, under which membership is a condition to employment as attorneys. In rejecting the contention that to condition the right to practice law upon membership in the integrated bar is to deny the right to practice law itself, the Supreme Court of Wisconsin stated:

> "* * * assuming that failure to pay dues as prescribed by the order operates to suspend an attorney's membership in the association, his delinquency is the cause of his suspension. He may comply with the order and continue his practice of the law at any time he chooses. Membership in most associations is made dependent upon compliance with the conditions of membership which usually include the payment of a small fee * * * No lawyer will be or can be suspended except as a consequence of his own delinquency." *(Integration of Bar Case,* 244 Wis. 8, 11 N.W. (2) 604 at 620, 151 A.L.R. 586.)

A United States Industrial Commission recognized many years ago that a similar principle is applicable with respect to closed-shop agreements. It said:

> "If the union is willing to receive any competent person into its ranks, no man can complain of being absolutely deprived of work because union men refuse to work with him so long as he fails to join the organization." (Final Report of the Industrial Commission (1902), Vol. XIX, p. 817, H. Doc. No. 380, 57 Cong. 1st Sess. (1901-02).)

What the States have done in these cases is to decree that the condition imposed upon employment in particular enter-

prises by closed-shop contracts, i.e., union membership, is *per se* unreasonable. But to so single out one condition and condemn it as unreasonable is not to protect the opportunity to secure employment or the right to work as such. The State's declaration of "unreasonableness" must, therefore, turn on an appraisal of the interests affected by the presence of the condition and by its abolition, and it is in the light of these considerations that the validity of the enactments must be judged.

2. The Right to Refuse to Join a Union Is Not the Constitutional Parallel of the Right to Join Labor Organizations.

Since, as we have indicated above, the objective of these amendments cannot be to protect the "right to work" as such, or in the abstract; it must be to protect an alleged right of employees to refuse to become or remain members of labor organizations. The state courts below have in effect conceded in their opinions that the objective of the enactments is to protect what they and the sponsors of the enactments conceive to be the right of employees to refuse to join a union—the right to work as a non-unionist with no obligation to adhere to the common rule of his fellow workers.[12] And, in seeking support for state authority to so protect that alleged right, the courts, as do political sponsors of anti-closed shop legislation, purported to find analogy in legislation which, to protect the right to join labor organizations, prohibit employers from discriminatorily denying employment to union members. Thus the Supreme Court of North Carolina stated in its opinion:

[12] It should be noted, parenthetically and apropos the *bona fides* of a claim that a right to work as a non-unionist is the primary object of the legislation, that the anti closed shop laws make no distinction between types of union security agreements, but include, under the broad prohibition, all provisions requiring membership in the union as a condition of employment. Thus, there are included maintenance of membership agreements under which employees have from fifteen to thirty days to decide whether they wish to become union members, and those who decide not to join may continue to work as non unionists for the remainder of the term.

> "If the State may say to the employer, 'you cannot deny work to anyone because of his membership in a union,' we think it follows *a fortiori* that the state may say to the parties 'you cannot deny work to anyone because he is not a member of a union,'" (The Nebraska Court made the same argument (No. 47, R. 57).)

Only verbal parallelism between the "right to join a labor organization" and the "right not to join" lends color to the contention that constitutional sanction extends impartially to both and that the state may therefore protect the one as it may protect the other. But to rest content with a delusive verbal parallelism, as did the state courts below, amounts to abnegation of the judicial function. "Such oversimplification, so handy in political debate" here as in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 636, "lacks the precision necessary to postulates of judicial reasoning."

As Judge Charles E. Wyzanski, Jr., pointed out in his article "*The Open Window and the Open Door*," 35 Calif. L. Rev. 336, 350:

> "The issue of the 'open shop' turns on the right of men in particular employments *not* to join an organization. Despite verbal similarities, 'the right not to join' is not the precise practical converse of 'the right to join.' And the history and implication as well as the values of the two asserted rights are best considered separately."

Only in the light of the reasons for and the scope of the right to join labor organizations can there be meaningful discussion of the so-called right of employees in a particular employment not to join the labor organization to which their co-workers adhere. As we have seen in the discussion earlier, the existence of the constitutional right to form and join labor organizations for the purpose of collective bargaining is attributable, in large part, to the necessity of permitting workingmen to achieve equality of bargaining power with employers and to participate

effectively in determining the common conditions under which they work. The purpose of the guarantee of the right to join labor organizations is served by the exercise of the right—its purpose is not served by the failure to exercise it. Just as a man cannot be said to be exercising a corollary of the right not to be compelled to give self-incriminating testimony by voluntarily testifying against himself, so a man cannot be said to be exercising a corollary of the right to join labor organizations by refusing to join.

If refusal by employees to join a labor organization had no effect upon the effective exercise by others of their constitutional right to join and maintain labor organizations, it might be said that the right to refuse to join, though not a corollary of the right to join, finds constitutional sanction in general considerations of freedom of choice which are not without independent value in our society. But it goes without saying that our Constitution does not guarantee any individual liberty which in practice results in frustration of the constitutional rights of others. We have seen that refusal by some employees to join a union deprives others of their opportunity to achieve equality of bargaining power with employers and thus frustrates the exercise by them of their constitutional right to form labor organizations. To hold that nevertheless these employees have a constitutional right to refuse to join a labor organization, a right which the States may protect against the otherwise lawful conduct of union members and employers aimed at inducing them to join, is to hold that the Constitution, which guarantees the right to effective self-organization as an antidote to slavery, subverts that guarantee in the name of the individual worker's liberty.

Of course, if the union membership or non-membership of other employees were, like the fact of their race or religion, a factor irrelevant to the legitimate interests of the union members, it could be said that the action of union members in conditioning their services upon agreement by the employer to hire only union members not only need

not be sanctioned by the State but cannot constitutionally be supported by the exercise of state authority. The fact is, however, as we have seen, that the union membership of each person hired is of the most vital concern to the legitimate interests of the labor organization of which employees are members. Each non-unionist hired is a threat to the effectiveness of the organization in dealing collectively with the employer; the presence of even one non-unionist in a shop reflects itself directly in loss of union power to better and maintain wages, hours and working conditions—the common rules of employment.

Nor, from the point of view of the employer, is the agreement to employ only union members irrelevant to legitimate business purposes. In the first place, since employees clearly have a constitutional right to refuse to work with others who are not members of their union, the employer's agreement to hire only union men may be indispensable to the securing of an adequate work force. In the second place, since employees clearly have a constitutional right to purchase goods only from those employers who hire union members exclusively, and many exercise that right through the union label device, the employer's agreement to hire only union members may be necessary to secure an expanded market for his products. Finally, because of the standard of competence insisted upon as conditions of membership by many labor organizations, employers may desire to enter into such agreements as a means of assuring that only competent workers will be employed.

On the other hand, the employer who makes union nonmembership a condition of employment, as this Court said in the *Jones & Laughlin* case, *supra*, is not only interfering with the fundamental right of his employees to self-organization but also is protecting no legitimate interest of his own. It is not a part of his right to prevent his employees from achieving equality of bargaining power with him; it is rather an abuse of his power and a denial of the employee's rights.

The "right" to refuse to join a union stands, at best, on no higher constitutional plane than the "right" of workers to bargain individually with their employers. Yet that "right," as we have seen (see pp. 51-61, *supra*), may be extinguished by government as an incident to the protection of the basic constitutional right of employees to bargain collectively. It is obvious, of course, that decisions like that in *J. I. Case, Medo* and *Order of Railroad Telegraphers* could not have been made if the right of the individual to bargain the terms of his employment were deemed constitutionally on a parity with the right of the employees as a group to bargain collectively and bind by their agreement all employees of the employer, including individuals who have not authorized the union to negotiate for them. To be compelled to choose between working on terms negotiated by another whom the employee has not designated as his representative, or not working in the plant at all, is certainly as great a deprivation of freedom as is the compulsion to choose between joining the union and not working at the plant, which is the choice available to employees under closed-shop contracts.

3. The State Cannot Create a Right Not to Join a Union Where Protection of Such Right Involves Denial to Labor Organizations of the Right to Insist on Union Membership as a Condition of Employment.

The analogy between the right to bargain individually and the right to work as a non-unionist, and the fundamental difference between a right to work as a unionist and the right to work as a non-unionist, discussed above, likewise affords the answer to the possible claim of the States, that although the right to work as a non-unionist may not have a constitutional status, nevertheless it is within state power to create such a right and to protect it against infringement. Such an argument would mean that those employees who value their own bargaining position

more than that of the group as a whole could be empowered by law to destroy the effective exercise by the entire group of their constitutional right to organize for purposes of collective bargaining. "The effect is not merely one of minority protection. It is also one of majority prohibition." *United States of America v. Congress of Industrial Organizations*, 335 U.S. 106, Mr. Justice Rutledge concurring. See also *DeMille v. American Federation of Radio Artists*, 187 Pac. (2d) 769 (Calif. Appeals, 1947), aff'd 31 Cal. (2d) 137, cert. denied, 333 U.S. 876; *Bowe v. Commonwealth*, 320 Mass. 230, 69 N.E. (2) 115.

The crux of the matter is that the constitutional right to self-organization is premised upon the necessity of unanimous group action—adherence to the common rule—by workers in negotiating and bargaining with employers concerning the terms of their employment as the alternative to virtual slavery in our society. The implications of that right cannot be understood if the workers in a single shop or industry are viewed solely as individuals, and not as members of the entire group. In determining whether to join and be represented by a labor organization, the group must choose whether to become organized society whose voice shall be heard through a single representative speaking for all, a society in which all must participate to obtain the benefits of unified dealing with the employer and in which a measure of individual liberty must be sacrificed for the welfare of the society, or whether as among them anarchy shall continue to exist. Once again we revert to the close analogy between the duties of workers in an industrial society and the duties of citizens in a political society in support of the contention we are here advancing. The analogy to the formation of civil government by the consent of the participants, but over the objection of the dissenters who may escape participation in the society only at the price of leaving the territorial jurisdiction of its government, is directly applicable. In the absence of statutory protection of the common rules of the union organization,

the legal power of an individual not to join a union gives the individual the power to destroy the society to which he in fact belongs.

In its opinion, the Nebraska Court said its state statute made each individual

> "* * * free 'to associate with his fellows' in a union entirely upon its merits, or 'to decline to associate with his fellows' without imperiling his right either to obtain employment or to continue therein after having obtained it." *(Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., et al.,* No. 47, R. 57.)

In this dictum, ordinary words reveal one real meaning of legal terms. An individual employee, by taking and holding employment, joins a society of his fellow-workers. He is not, by the nature of his relationship, "free to associate or disassociate with his fellows." He is, inevitably, inherently a fellow of their society. The statutes at bar purport to free him of the common rules, of their fair and equal application, in order to protect his individual liberty. But liberty is not the right to be free of an organized society. This Court has said:

> "* * * the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *(West Coast Hotel Co. v. Parrish,* 300 U.S. 379, at 391.)

In *Nebbia v. New York*, 291 U.S. 502, at 523, this Court restated the principle of liberty in a society:

> "* * * government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."

Of course, democratic governments themselves may come into being only at the will of a majority of the people. So,

the infusion of deep rooted democratic concepts into the right to self-organization may dictate that the right to form industrial government, in which all employees must participate as a condition of employment, need extend only where a majority of the employees have joined a labor organization. But this limitation is without application here, for these laws apply to prohibit absolutely closed-shop contracts even where all of the employees are members of the union. They decree that for industrial society, unlike our political society, there shall never—and under any circumstances—be recognized the right of the majority to rule. In no instances shall individuals who seek to live and work in industrial society be deemed to have obligations to other individuals in the group or to the group itself. "The accepted principle of majority rule which has become a bulwark, indeed perhaps the leading characteristic of collective activities is rejected in favor of atomized individual rule and action." (*United States of America v. Congress of Industrial Organization*, 335 U.S., at 147, Opinion of Mr. Justice Rutledge.) Just as democratic society could not survive in our political life under such a rule, so the constitutional right to self-organization cannot survive it.

We are here asserting simply that no law which absolutely prohibits the making and performance of union-security contracts can stand, at least in the absence of a showing, not even attempted here, that pressing public necessity demands their abolition. We say that the power to enter into such contracts may not be abridged by the States, as it has been in these cases, on the plea that abolition is necessary to protect a non-existent right to work as a non-unionist. We say that just as a state may not make the right to be a slave a cornerstone of its legislative policy, so may it not make the right to work as a non-unionist a cornerstone of legislative policy. We say that when the state ties the hands of organized workingmen and prevents them from making contracts which are essential to the preservation of their organizations and their standard of

living, it cannot justify its conduct on the ground that outlawry is necessary to protect the right of other employees to destroy the efficacy of their organizations and threaten their standard of living by remaining outside the organization. This is not legislation in the public interest—this is an undermining of constitutional guarantees. To shield non-unionists from the competition of union members which might induce them to join the union, is to create a monopoly for servitude in the name of freedom. The forces in our society which seek to make the ideal of free and voluntary labor a reality may not be subjected to such shackles.

4. The Enactments Cannot Be Justified as Protecting Against an Alleged Monopoly Achieved by Union-Security Agreement.

Closely related to the charge that the union shop invades the right to work as a non-unionist, discussed in the preceding section, is the charge that the union shop creates or attempts to create some sort of a monopoly or restraint of trade, presumably in job or work opportunities.[13] Thus, the North Carolina statute specifically put these contracts in this category and subjects those who enter into them to the criminal penalties for violating the prohibitions against restraints of trade and monopolies. *Whitaker v. North Carolina*, No. 34, R. 57-58.

It is apparent that no monopoly or trade restraint in the usual or legal sense can be intended because no control over a market in commercial goods could be accomplished by virtue of a requirement of union membership as a condition of employment, and whatever restraint exists is not by producers of goods. As used by this Court and heretofore by state courts when referring to the term "monopoly" or "restraint of trade," such terms embrace at the mini-

13 That there exists in fact no sort of monopoly or restraint of trade in jobs in either Arizona, Nebraska or North Carolina is clear from the record. In each of these States only a very minor portion of each trade or industry is employed under union shop conditions (No. 27, R. 17; No. 47, R. 7; No. 34, R. 13, 17-21).

mum some relationship to the power by a producer to fix prices or control markets of commercial goods. See *American Tobacco Co. v. United States*, 221 U.S. 106; Economic Brief, App. E, p. 31. Furthermore, labor is not an article or commodity of commerce; labor organizations are associations of men constituted for purposes of self-protection, not for making a profit. But apart from human values and the distinction between goods and personal services, there is a truly economic distinction between business combinations and unions of workmen. Business organizations can, and by law should, thrive on competition. Competition is based on differences in price, quality or other elements of trade. But, as we have seen, unions cannot exist without the common rule; in this respect they are like carriers, utilities and standard insurers. *J. I. Case Co. v. N.L.R.B.*, *supra*; *Order of R.R. Telegraphers v. Railway Express Agency*, *supra*.

Accordingly, the proponents of anti-union-shop laws who assert existence of a monopoly as a justification must refer to some other sort of monopoly or restraint of trade than that usually employed under the term, and the reference must be to any attempt to eliminate competition of non-union workers. But this objective we have seen to be the natural and inevitable objective of any national labor organization—an objective justified not only on social and economic grounds but also on constitutional grounds. See *Apex Hosiery v. Leader*, *supra*. The attempt by unions to place all business units in an industry on the same footing, in so far as wage rates are concerned, is universal; however, as observed by Mr. Justice Holmes in *Payne Lumber Co. v. Neal*, 244 U.S. 459, at 471, such attempt had "no tendency to produce monopoly of manufacture * * * since the more successful it is the more competitors are introduced into the trade." If the elimination of competition of non-union workers constitutes restraint of trade, or the extent to which it is successful creates some sort of monopoly, both of which the State has power to prevent, then

for the same reasons similiar justifications would be available to outlaw the very principle of self-organization and collective bargaining, at least to the extent that such organization was successful and extended to any appreciable portion of a trade or industry. *I. J. Case Co. v. N.L.R.B., supra; Order of Railroad Telegraphers v. Railway Express Agency, supra; Apex Hosiery Co. v. Leader, supra.* What the States of Arizona, Nebraska and North Carolina are really saying is that they do not object to self-organization of employees as long as it is not successful and as long as no effective means of accomplishing or maintaining organization are adopted. Certainly, as pointed out in the preceding section, such an asserted justification is objectionable both on the grounds that basic constitutional rights are thereby subverted and on the grounds that no possible public interest could thereby be served.

5. The Enactments Cannot Be Justified as Mere Regulation of Contracts.

The fact that a contract device is utilized to effectuate the desired end—adherence to the common rule—does not detract from the fundamental nature of the right here asserted. The contract serves merely to formalize the exercise of the constitutional right; it embodies employer recognition of the right. Further, such a contract is, in effect, a device for assuring that for its term union members will not be impelled to leave work by virtue of the employment of a non-unionist. Such assurance is, in fact, indispensable to modern collective bargaining, for without it workers could not, without imperiling their organizations, and their bargaining power, waive for any fixed period their right to strike. Absent such an agreement, an employer who wished to assure continuity of his work force would simply not hire non-unionists. Formalization of this practice by agreement provides necessary assurance to workers that their income for a period will not be imperiled by the need for leaving work if a non-unionist is hired.

It should be noted that the making of an agreement between an employer and a labor organization governing terms and conditions of employment in the enterprise is not, of itself, an unlawful act. The power to make such agreements is today a necessary part of the right to self-organization. See *H. J. Heinz Co. v. N.L.R.B., supra*. The issue in these cases, then, is not whether union membership may be made a condition of employment by unlawful means, but whether union membership, as a condition of employment, may be made unlawful when secured by lawful means.

It is no answer to all of this to say, as did the courts below, that freedom of contract is not absolute, and may be limited in the public interest. Here the right to execute and to insist upon performance of a contract to employ only union members is not valuable merely as an incident to freedom of contract itself. Rather these specific types of contracts are products of the right to freedom of assembly which is specifically guaranteed by the Constitution and may not be abridged. Obviously, many contractual arrangements are made by persons engaged in the exercise of rights guaranteed by the First Amendment. For example, a contract for printing a leaflet is indispensable to the exercise of the right; the making of such contracts cannot be prohibited under the guise of regulating contracts.

Further, these statutes cannot be justified as a regulation of contracts because they not only prohibit contracts which make union membership a condition of employment; they also each contain a separate prohibition "that no person shall be denied employment because of non-membership in a union." Hence the statutes necessarily prohibit the operation of a union rule against working with non-members. Such a rule is expressly set forth in the Carpenters' Constitution involved in the Arizona case (No. 27, R. 14).[14]

[14] Even when it is not expressly set forth, it may exist by custom. In a Massachusetts case, a union member was held to have been properly disciplined for working with non members, though the rule was not expressly stated in his union's constitution, it was, however, proved to be universal and well known to all persons in the craft. *Clark v. Morgan*, 271 Mass. 164, 172 N.E. 790.

The refusal of union men to work with non-members necessarily means that the employer who wishes the services of union men must refuse to employ non-union workers. If it is not in the contract, the union will notify the employer of its rule, and will enforce it by quitting in a body if the employer forces a non-union employee upon their society. The employer will then choose, and if he discharges the non-union employee in order to retain union members, he has made union membership a condition of employment. He has, in the words of the statutes, "denied employment to a person because of non-membership in a union." Yet, clearly, his action was the direct result of the union members' refusal to work with a non-member. *Commonwealth v. Hunt, supra.*

**D. Since Fundamental Rights Finding Protection Under the First Amendment Are Here Involved, the State May Not Support the Prohibitions by Showing of Some Rational Basis in Exercise of Police Power.**

It is asserted that, in the end, the justification for these statutes is that the legislature decided that it was necessary, in the public interest, to prohibit union membership as a condition of employment. The legislative determination is conclusive, it is said, because it is a regulation within the reserved powers of the States in our federal system. This reserved power includes the great reservoir of police power which a state legislature may exercise to protect the public interest. The statutes are regarded as regulations of conflicting private interests in industrial relations and hence within "the power of the State to set limits of permissible conflict open to industrial combatants." With much emphasis, the state courts note that similar legislation has been enacted in sixteen states by constitutional amendment or statute: Arkansas, Arizona, Delaware, Florida, Georgia, Iowa, Louisiana, Maryland, Maine, Nebraska, South Dakota, Tennessee, Texas, Virginia. Both the North Carolina and Arizona Courts urge:

"Great weight must be attached to the fact that so many separate jurisdictions have, within a short space of time, seen fit to exercise their police power in the same manner and for the same purposes. The composite will of such a broad cross-section of our country cannot be lightly discarded as unreasonable, arbitrary or capricious or lacking in substantial relationship to its objective. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and wide-spread and has been reached after deliberation." (No. 34, R. 75; No. 27, 125; No. 47, R. 73.)

But popular sentiment cannot abridge constitutional rights.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (*West Virginia v. Barnette*, 319 U.S. 624, at 638.)

The passage of these laws in sixteen States might be impressive if the States were a composite, broad cross-section of the country, if the statutes were passed after deliberation. But the sixteen States are, however much they differ in other respects, with respect to labor relations very much alike. They are non-industrial states where unions are a minority group. The "deliberation" was an argument of prejudices, opinions and fallacious parallelisms. The statutes are the product of a single common misconception of union-employer-employee relations, namely, that the union "interferes" with the "natural" relations between employer and employees. In this view, it seems quite natural for the employer to fix the condi

tions of employment to which all persons seeking or holding employment with him must submit. It is *his* business. But that workmen should impose conditions upon those with whom they will spend a working day seems outrageous. That a man must join a union before he can get a job seems to be an arrogation of power by union officials. This conception of unions is further alarmed by the realization that union power leads to uniform working conditions in a given occupation or industry. In this view, the abuse of union power is easily observed; individuals are excluded from job opportunities by union restrictions upon entry into a craft; persons are forced to pay dues to unions; a worker is expelled from a union and thereby loses his job.

For all these alleged evils, there is a single remedy; outlaw union membership as a condition of employment and leave each individual free to seek his own terms and conditions of employment. If he wishes to join a union and secure common terms, that is his right; if he does not, and wishes to exercise his individual right to work on the best terms he can get, that is also his right. This action, say the state courts, does not impair any constitutional rights of unions or of union members; "labor's basic rights to organize into a union, bargain collectively, to strike and peaceably picket are not abridged." *American Federation of Labor v. American Sash & Door Co.*, (Ariz.) No. 27, R. 132.

This judgment of the state courts is counter to the philosophy and experience of unions which have held and practiced the belief that union membership as a condition of employment is indispensable to the existence of union organizations.

The applellants assert that fundamental constitutional rights have been impaired by the statutes at bar. The States say that the statutes are regulations in the public interest. It is for this Court to decide the issue

"That the State has power to regulate unions with a view to protecting the public interest [is] * * * hardly to be doubted.

"They cannot claim immunity from regulation. Such regulation, however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly." (*Thomas v. Collins*, 323 U.S. 516, at 532.)

**E. The Prohibitions Can Be Supported Only by a Showing of Compelling Public Necessity under the Clear and Present Danger Test; Such a Showing Is Not Even Attempted.**

Since union membership as a condition of employment is indispensable to the right of workmen to achieve equality of bargaining power and to exercise through unions their freedoms of assembly, the statutes at bar are clearly unconstitutional. They are not regulations of common union membership, but they prohibit any form of common membership. The fact that "a closed shop and a closed union" may lead to abuses is not sufficient to justify prohibition. When the exercise of a constitutional right is accompanied by abuses of the right, the legislature may suppress the abuse, but not the exercise of the right itself. *Thomas v. Collins*, 323 U.S. 516, at 547; *DeJonge v. Oregon*, 299 U.S. 353, at 364; *Murdock v. Pennsylvania*, 319 U.S. 105, at 116; *Lovell v. Griffin*, 303 U.S. 444, at 451; *Chaplinsky v. New Hampshire*, 315 U.S. 568, at 573; *Schneider v. State*, 308 U.S. 147, at 160-161.

Free assembly, like free speech, can be curbed only where its exercise has created a clear and present danger of harm to the State.

"Any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." (*Thomas v. Collins*, 323 U.S. at 530.)

It must be borne in mind that, since fundamental rights, as distinguished from property right, are here involved,

"Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill v. Alabama*, 310 U.S. at 95. See also *West Virginia v. Barnette*, 319 U.S. at 638.

There is no showing in this case of any clear and present danger. The theory of the statutes is, as we have pointed out above, simple: Union membership as a condition of employment is not protected by constitutional guarantees in any way, and it can be flatly prohibited. In each of the cases at bar the State made no attempt to prove that the particular union-membership agreement involved had been in any way oppressive or arbitrary. The issue is most clearly drawn by *Whitaker v. North Carolina*, No. 34. That case is a criminal conviction of an employer and several union officials. The proof by the State is confined to a single fact: That the employer and the union knowingly executed an agreement that the employer agrees to employ none but union members (No. 34, R. 8-10; State's Exhibit No. 1, 10-12).

That this contract is an evil is imputed to it by the statute. Thus, the indictment in the *Whitaker* case charges that the defendant labor unions

> "• • • did unlawfully and wilfully enter into an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in the State of North Carolina, by executing a written agreement or contract by and between said employer and said labor unions and organizations or combinations, whereby persons not members of said unions or organizations are denied the right to work for said employer contrary to the form and statutes in such cases made and provided and against the peace and dignity of the State." (No. Car. R. 3.)

We are back to 1840. This is the same charge made by the prosecution in *Commonwealth v. Hunt, supra*. Stripped of its verbiage, the charge is that union members, having notified the employer that they would not work with persons who were not members of their society, secured an agreement from the employer that he would hire only union members.

The Massachusetts Court held 106 years ago that this agreement was lawful on "principle." It is now for this Court to say that, in the circumstances of our times, the principle involved is a constitutional one.

The promise of *Commonwealth v. Hunt* was not kept because, though the principle was conceded, its application in specific cases hurt either non-union members or employers, and so it was held unlawful. But these decisions were based upon doctrines of master and servant, restraint of trade and justifiable and non-justifiable tort. These doctrines were ignorant of the experience of union men; their premises excluded the idea of the common rule; and they had to be abandoned when legal doctrine accepted the principles of collective bargaining and the constitutional status of the right of self-organization.

The decision by Chief Justice Shaw in *Commonwealth v. Hunt* required judicial statesmanship of a very high order. He had to relate his decision to the vital forces in the society of his time, Nelles, *Commonwealth v. Hunt*, 32 Col. Law Rev. at p. 1159. This Court has the same task and responsibility. It must apply the great principles of the Constitution to the developments of a modern society. It must intervene in an important conflict of interest between citizens of the United States. It must say where the line is between the exercise of private right and public regulation. We do not ask this Court to grant unrestricted liberty of action; we do not ask it to render the States impotent to correct abuse of rights. We ask this Court to hold only that the right of workmen to refuse to work with persons who are not members of their union is an

age-old practice of unions and essential to the exercise of their fundamental right to form unions; that a state law which broadly and flatly prohibits union members from making union membership a condition of the common employment of themselves and others prevents this practice and abridges the right of workmen to form unions. Such a decision safeguards constitutional liberties, while leaving the State with ample power to regulate and prevent any evils which may flow from the abuse of this right. We do not ask this Court to establish a new principle or a novel right; we ask only for the recognition of constitutional rights that have long been exercised by workmen in their associations and assemblies as they sought to establish a common rule for the guarantee of equality and law in their everyday affairs.

In the practical world the value of membership in an organization stems largely from the fact that the benefits achieved through association may be and are restricted by the group to its members. Where such restriction has been deemed to give rise to evils within the appropriate area of state control, it has uniformly been held appropriate to eliminate the evils only by prying open the doors of membership to all who wish to join rather than by depriving the association of its reason for existence by prohibiting it from excluding non-members from its benefits. See *Associated Press v. United States of America*, 326 U.S. 1. We ask no more than that similar concepts be applied in the present cases.

## III

## EVEN ASSUMING THAT RIGHTS OF A LESS FUNDAMENTAL NATURE ARE HERE INVOLVED, NEVERTHELESS THE ABSOLUTE UNION-SECURITY PROHIBITIONS MUST FALL AS BEING DEMONSTRABLY ARBITRARY, DISCRIMINATORY AND WITHOUT RATIONAL BASIS; SUCH ABSOLUTE PROHIBITION OF SO IMPORTANT A RIGHT IS CLEARLY EXCESSIVE WHERE REGULATION WOULD ACCOMPLISH ALL POSSIBLE OBJECTIVES.

In the preceding section of this brief it has been demonstrated that the rights affected by the laws in question are of a fundamental nature going to the very existence of labor organizations and their ability effectively to function on behalf of their membership. If, however, it be argued or assumed that the rights invaded by the anti-union-security laws involved in the instant cases are not fundamental in nature, but instead comprise some lesser species of right, as, for instance, a bare right to bargain and to enter into contracts respecting union-security, protected only as would be a property right under the Fourteenth Amendment, then, nevertheless, the law must be stricken as an arbitrary and irrational deprivation of that right, even under the more stringent test of constitutionality that would then be applicable.

### A. Principles Applicable to a Determination of Whether Legislation Is Arbitrary or Without Rational Basis.

It is recognized that the burden upon one challenging state legislation under its police power in the field of property rights protected solely under the due process clause of the Fourteenth Amendment or under the contract clause of Article I, Section 10, is a heavy one, and that the State has greater leeway in imposing regulations and prohibitions when only the Fourteenth Amendment is involved

than when is also the First. See *West Virginia v. Barnette*, 319 U.S. 624, at 638.

In *Nebbia v. New York*, 291 U.S. 302, this Court stated the applicable rule as follows:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exercise of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (291 U.S. at 525.)
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> "* * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence *an unnecessary and unwarranted interference with individual liberty.*" (291 U.S. at 539). (Emphasis supplied.)

A similar test is applicable to attempts by the State to restrain the more specific liberty of contract as protected under the Fourteenth Amendment. See *West Coast Hotel v. Parrish*, 300 U.S. 379. Directly applicable because of the closer analogy between the facts presented is the case of *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, where this Court struck down a state law restricting, through the imposition of compulsory arbitration, the right of employers and employees to enter into mutually acceptable collective bargaining agreements. There, the Court stated (at 534) as follows:

> "These qualifications do not change the essence of the act. It curtails the right of the employer, on the one hand, and of the employee, on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the 14th Amendment. * * * While there is

> no such thing as absolute freedom of contract; and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances."

That similar considerations are applicable when considering possible conflict with the contract clause (Article I, Section 10) is seen from *Home Building & Loan v. Blaisdell*, 290 U.S. 398, and *East New York Savings Bank v. Hahn*, 326 U.S. 330.

Running through the foregoing and other decisions of this Court, undertaking to define the permissible limits of government regulation when rights under the Fourteenth Amendment or under the contract clause are asserted, are such phrases as "reasonable," "necessary," and "warranted." Time and again a "rational basis" test is used. See especially the dissenting opinion of Mr. Justice Frankfurther in *West Virginia v. Barnette*, 319 U.S., at p. 646. But obviously, judicial opinion concerning the "reasonableness" of any particular legislation or concerning the existence of a "rational basis" could vary as do the predilections and preconceptions of the individual Justices. Moreover, such opinions could very easily embody appraisals of wisdom or propriety or evaluations of policy, matters which this Court has constantly affirmed are not its concern. *Olsen v. Nebraska*, 313 U.S. 236. It was not many years ago that a too facile resort to an opinion concerning "reasonableness" resulted in abrogation of much legislation which a more critical examination would disclose, as it subsequently did disclose, had many rational bases in the serving of public interests. Aware of these and other considerations, this Court has evidenced an increasing reluctance to strike down legislation as violative of either the due process or contract clauses, the Court reading the Constitution to confer on the States a somewhat free hand in the exercise of their police power, and leaving to the demo-

cratic process the correction of abuses of that power. See Braden, *Umpire to the Federal System*, 19 University of Chicago Law Review 27. But that is not to say that this Court has abandoned or could abandon its function and duty of determining in each case whether the liberties essential to a free society and finding protection under the Fourteenth Amendment have been unwarrantedly denied, even though such liberties may not have the stature of other more fundamental liberties more specifically protected under the First Amendment or elsewhere. It needs no declamation to remind that nothing is more dangerous to the genius of our institutions than an unrestrained resort to the police power justified only by the existence of a vague public interest or social convenience. The protection of such rights of the individual as "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned" (*Allgeyer v. Louisiana*, 165 U.S. 578, at 589) is the principle purpose of the Constitution itself, and it is the Constitution alone, as enforced by this Court, which stands as a shelter against arbitrary or excessive invasion by the State, in the claimed exercise of its police power, of those individual liberties and freedoms. Thus, a too great reluctance to intervene when the Constitution is invoked gives encouragement to statism and is contrary to the spirit of a people who did all that was humanly possible to secure individual liberties in a written constitution. It must ever be remembered that

> "• • • By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people • • • The Constitution of the United States is a law for rulers and people, equally in war and in

peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." (*Ex Parte Milligan*, 71 U.S. 281.)

Thus, the task before the Court in the present cases, as in others where the Fourteenth Amendment is invoked, is to reconcile, under a test of reasonableness or arbitrariness, the need for protections of individual freedoms, daily becoming more precious in this world and age, with the need for social experimentation by the State, often found necessary to make those very freedoms more meaningfull. How best to accomplish so difficult and delicate an assignment? The approach first advocated by the late, great Justice Brandeis, while still a practicing lawyer before this bar, has contributed much to a solution. Under the promptings of his economic briefs in cases involving the constitutionality of social legislation, commencing with *Muller v. Oregon*, 208 U.S. 412, this Court has evolved a somewhat more strict and definite test than is afforded by the vague phrases of the Fourteenth Amendment or by judicial guess as to what is arbitrary or unreasonable. It is now held that any judgment concerning the reasonableness or unreasonableness of any particular legislation must be an informed judgment based upon as precise and accurate information as is obtainable concerning existing economic or social conditions involved in and justifying the attempted exercise of the police power. Reasonableness of legislative regulation or prohibition of constitutionally protected rights accordingly must depend upon an examination of all relevant facts and factors, including an examination of the nature of the activity which is being regulated or suppressed, of the impact of such regulation or prohibition upon the public, of the question of whether there are any social or economic conditions requiring intervention by the State, and of whether the public interest is in fact served by the prohibition. "Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induce it." McKenna, J., in *Mutual Loan*

*Co. v. Martell*, 222 U.S. 225, at 233. "The function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as an able exertion of governmental authority or condemn it as contrary or discriminatory." *Nebbia v. New York*, 291 U.S. at 536. And as further stated in the *Nebbia* case:

> "* * * regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." (291 U.S. at 525.)

Justice Brandeis, in his dissent in *Adams V. Tanner*, 244 U.S. 590, at 600, gave early and excellent expression to the applicable principles when he stated:

> "Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by a priori reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible. Ex facto jus oritur. That ancient rule must prevail in order that we may have a system of living law.
>
> "It is necessary to inquire, therefore: What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other states or countries in this connection?"

The *Nebbia* case affords a classic illustration of the method which necessarily must be followed if the courts are intelligently to pass upon the ultimate question of the reasonableness of any particular law impairing private rights. There, the Court undertook a detailed study of the grave economic situation existing in the State of New York in the milk industry as a result of the 1930 depression and concluded that as an actual factual matter legislative intervention was necessary even though it involved setting

prices in an industry in no way dedicated to public use. But only after such examination did the Court conclude that,

> "*In the light of the facts* the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk." (291 U.S. at 530.) (Emphasis supplied.)[15]

Examination into economic facts and circumstances as a means of forming a basis for adequate judgment as to reasonableness is a necessary preliminary to such judgment if the exercise by the State of its police power is not to become a bootstrap proposition; under any other rule the mere assertion by the State of a need or necessity for any particular legislation would foreclose the question of

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[15] This method of approach by inquiry into facts and circumstances and into specific economic conditions, termed "sociological jurisprudence" by Dean Pound, has been described and commeated upon in important law review articles. See "Hours of Labor and Realism in Constitutional Law" by Felix Frankfurter, 29 Harv. Law Rev. 353; "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action" by Henry Wolf Bikle, 38 Harv. Law Rev. 6; "Due Process of Law, Police Power and the Supreme Court" by Ray A. Brown, 40 Harv. Law Rev. 943; "Police Power—Legislation for Health and Personal Safety" by Ray A. Brown, 42 Harv. Law Rev. 866; Note, 49 Harv. Law Rev. 631, "The Presentation of Facts Underlying the Constitutionality of Statutes."

Justice Brandeis, in particular, in his great dissents in cases involving social legislation, relied either upon legislative findings or upon sociological and economic data to support his conclusion that the particular legislation found justification and rational basis, or a lack thereof, in the existing economic circumstances and conditions. See his dissents, for instance, in *J. Burns Baking Co. v. Bryan*, 264 U.S. 504; *Truax v. Corrigan*, 257 U.S. 312; *New State Ice Co. v. Liebman*, 285 U.S. 262. The reasoning and method of approach set forth in these dissents have now been accepted by the full Court. See *Nebbia v. New York*, *supra*; see also *Muller v. Oregon*, *supra*; *McLean v. Arkansas*, 211 U.S. 539; *Price v. Illinois*, 238 U.S. 446; *Bunting v. Oregon*, 243 U.S. 426; *Levy Leasing Co. v. Siegel*, 258 U.S. 242; *Borden's Farm Products v. Baldwin*, 293 U.S. 194, for instances of the Court's reliance upon specific circumstances and economic conditions as serving to justify the challenged legislation. A compelling illustration is afforded by *Thompson v. Consolidated Gas Utilities Corporation*, 300 U.S. 55.

constitutionality. As stated in *Wolff Packing Co. v. Court of Industrial Relations, supra:*

> "• • • If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention • • •" (262 U.S. at 539.)

So much for applicable principles of law. Summed up, they amount simply to this: Rights under existing contracts and private liberties and freedoms protected under the Fourteenth Amendment are subject to restriction if there is an actual, not speculative necessity therefor in the protection of public health, safety, morals or welfare, and if the means adopted to accomplish such purposes are reasonably related to the ends sought. Whether there is such a basis must be determined factually by close examination into many factors. Only in this way can judgment on the ultimate question be adequate. It is the purpose of the following portion of this brief to demonstrate, in the light of all circumstances, including consideration of the nature and function of union-security agreements in a modern industrial society, that the laws abolishing union-security agreements are arbitrary, unreasonable and excessive because the law finds no basis or justification in any existing or possible social or economic conditions requiring such drastic intervention by the State; because the law serves no possible public interest, but, on the contrary, operates to the prejudice of the public generally and serves to benefit only private rights of a limited class; and because the law is excessive in that any possible object sought to be achieved can be achieved by regulation of the union-shop relationship rather than by complete and unqualified prohibition.

**B. The Nature of the Activity Proscribed and the Impact of Such Proscription.**

The first step in determining the reasonableness of the prohibitions in question is to inquire into the nature of the activity proscribed, together with the effect of the legislation—here complete prohibition—on such activity. Thus, it can be seen whether the extent of the taking is great or small. If great, the justifications in public interest should reasonably be commensurate on the principle that one does not sever an arm to save a finger. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, at 413, 414, where the Court speaking through Mr. Justice Holmes, stated:

> "The extent of the public interest is shown by that statute to be limited * * * On the other hand, the extent of the taking is great."

The salutary and beneficial functions of union-security agreements—not only in respect to labor organizations and employees but also in respect to employers and the general public—have been previously referred to in this brief and are established in the record either by admitted allegations or by specific testimony of expert witnesses. The entire discussion in Part II indicates that the principal of union security goes to the very core of American unionism. It is hardly to be disputed that agreements requiring union membership as a condition of employment constitute the *only* proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate share of the joint product of capital and labor; and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees and enforcement of the common rule.

In addition to what has been stated in earlier portions of this brief, other considerations are here relevant. For

instance, the union-security agreement as the one means available to labor for consolidating its gains and eliminating ruinous wage competition can well be contrasted with the many methods available to business managers for bringing about price and production control and for consolidating a profitable position in an industry or trade once it has been achieved. The study attached to the Economic Brief herein as Appendix E examines in detail the various techniques available to and used by business managers in an effort to secure collective security for themselves through the regulation or elimination of price competition and directs attention to five "influence pressures" and dozens of "economic pressures" used for bringing about price and production control, together with seven "consolidation measures" available when such price stability has been achieved, most of which pressures and methods have been sanctioned by the courts and the legislatures. As against this, organized labor has been deprived of its one consolidative technique. See Appendix E, pp. 18-24.

The heavy contribution made by union-security agreements to industrial stability and peace is demonstrated at length in the Economic Brief. It is there shown that, in addition to producing harmonious and productive relationships in many industries, union-security agreements have played a fundamental role in forestalling wage decreases and in counteracting inflationary trends. See Economic Brief, pp. 46-62. The Economic Brief further demonstrates that elimination of the union-shop institution will inevitably lead to disruption of previously harmonious relationships and to strife and turmoil over broad industrial fronts where labor organizations will once more find themselves fighting for their very existence.

Finally, it is important to note that the courts have universally recognized the union-shop principle as an indispensable factor in the process of establishing and protecting wage standards and organization itself. Attached to this brief as Appendix F is a compilation of cases in twenty-six

states which, either directly or by positive inference, uphold union-shop agreements. See also Appendix E, p. 5, f.n. 7(B). The rationale of these decisions is summed up in the *Restatement of the Law of Torts*, pp. 128-130, 166, 167.

It is further significant that the federal Congress, both in the original and the amended National Labor Relations Act,[16] and the legislatures of seventeen states specifically authorize union-security agreements.[17] Such legislative and judicial sanction, at the very least, recognizes the necessity and indispensability of union-security agreements in a modern industrial society.

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[16] 49 Stat. 452 (1935), 29 U.S.C.A. Sec. 158(3) 1947), as amended, 29 U.S.C.A. Sec. 158(a)(3) (Supp. July, 1947).

[17] Cal. Lab. Code (Deering 1943) Sec. 1126; 3 Colo. Stats. Ann. (Michie, Supp. 1946) c. 97, Sec. 94(6)(c) (requires three fourths of employees in a bargaining unit to vote authority for the execution of the agreement); Conn. Gen. Stats. (Supp. 1945) Sec. 937h(5); Del. Laws 1947, H.B. 212 Sec. 3 (a), 2A CCH Lab. Law Serv. 41001-2; but the Alabama Supreme Court has refuse or agree to execute a union security agreement); Me. Laws 1947, c. 25, Sec. 41-A, as added, c. 395, 2A CCH Lab. Law Serv. 43301 (1947) (prohibits the closed shop form of union security agreements but permits the union shop form); Mass. Gen. Laws (1947) c. 150A, Sec. 4, subsec. (3), as amended, c. 657, 2A CCH Lab. Law Serv. 43503.2 (1947); Mich. Comp. Laws (Mason Cum. Supp. 1940) Sec. 8628.14; Minn. Stats. (Mason 1941) Sec. 179.12(3); Mo. Laws 1947, S.B. 79, Sec. 5; N. H. Rev. Laws (1942) c. 212, Sec. 21, as amended, Laws 1947, c. 194, Sec. 21, 21-a, 2A CCH Lab. Law Serv. 44601, 44602 (1947) (requires two-thirds of employees voting to authorize execution of the agreements, but they must be at least a majority of all employees in the bargaining unit; Ala. Acts 1943, No. 298, Sec. 8, p. 256 Laws 1947, c. 47 and 75, Secs. 34:13B-2; 2A CCH Lab. Law Serv. 44701, 44702 (1947); N. Y. Labor Law art. 20, Sec. 704(5); Pa. Stats. Ann. (Purdon 1941) Sec. 211.6(c); R. I. Pub. Laws 1941, c. 1066, Sec. 5, subsec. 5; Utah Code Ann. (1943) Sec. 49-1-16(e); Wis. Stats. (1943) Sec. 111.06(c)-1, as amended, Laws 1945, c. 424 (requires two-thirds of employees voting to authorize execution of the agreement, but they must be at least a majority of all employees in the bargaining unit); N. J. Rev. Stats. (1946) c. 38, as amended, (this law was at first interpreted by the state attorney general as proscribing union-security agreements, see *Opinion of Attorney General, Nov. 20, 1945*, 2A CCH Lab. Law Serv. 41905 (1947) (however, an employer can lawfully recently held that it proscribes only those agreements achieved through force and intimidation while permitting all other agreements. Hotel and Restaurant Employees Int'l Alliance and Bartenders League of America v. Greenwood, 30 So. 2d 696 (Ala. Sup. 1947).

The States of Arizona, Nebraska and North Carolina have eliminated this institution of the union shop, and in doing so it is important again to note that they have failed to provide any substitute or equivalent for the union-security principle, such as, for instance, might be afforded by state control as under the Railway Labor Act (App. E, pp. 28-29; Economic Brief, p. 66). While it might be argued that the Nebraska and North Carolina laws prevent discrimination against union workers (as does also the National Labor Relations Act in interstate industries), the remedies available for such discrimination are not altogether satisfactory (Economic Brief, pp. 44-45), and, in any event, as we have seen, the primary function of union-security agreements is not the elimination of opportunity for discrimination, but achieving an equality of bargaining power and the elimination of wage competition of unorganized employees, whether such competition be felt by the direct competition for wages in plants where no exclusive collective bargaining rights exist or by the gradual but inevitable elimination of the majority status and bargaining power of organizations have an exclusive recognition status, but not having any assured means of maintaining that status, such as the union shop alone can bring.

We are now in a position to make a more exact appraisal of the reasonableness of the absolute prohibition of union-security agreements attempted in the present cases. A right or a liberty which has become an institution in our twentieth century industrial economy and which has been sanctioned by courts and legislatures everywhere has suddenly been outlawed, and this without any substitute whatsoever being provided, or without any exceptions being specified. An institution going to the very core of unionism, and which arose out of and has its reason for being in the necessities of the situation, has been destroyed. An important and traditional subject matter of collective bargaining has been withdrawn from the field of employer-employee negotiations. Employees have been deprived of their one

technique for eliminating cutthroat wage competition of non-union employees and for consolidating gains and bargaining strength, while, on the other hand, business managers have been permitted to retain many techniques for regulating price and production policies directly affecting competition between employers and employees. The ability of business managers to gain an adequate share of the national income has been directly increased, while that of organized employees has been directly lessened. A useful and often beneficial method of stabilizing industrial relations has suddenly been withdrawn. Surely, the justification for this deprivation must be compelling, or there is no institution, no activity, which is safe from obliteration by the State in the claimed exercise of its police power. What are these justifications?

### C. The Inadequacy of the Claimed Justifications for Complete Prohibition of Union-Shop Agreements.

To begin with, it should be noted that the States of Arizona, Nebraska and North Carolina, unlike the State of New York in the *Nebbia* case, *supra*, did not undertake a detailed study of the economic conditions arising out of or because of the use of union-shop agreements as a means of determining whether legislation was in order. There is no record of any legislative hearings or of any legislative findings concerning the impact of union-security agreements upon the public or of conditions affording a basis for the proscriptions in question. In the *Nebbia* case and other similar cases before this Court the findings of legislative bodies or of investigatory legislative committees were heavily relied upon in finding justification for the particular regulations.

What was deemed justification for the legislation—what are its purposes—can be obtained only from an examination of the legislation itself and, in particular, from an examination of the title, preamble or declaration of purpose. Further light on this question can be obtained from the arguments advanced both by the respective Attorneys

General in support of the legislation and by the sponsors of the legislation who appeared in court to argue respecting its validity. From these sources the claimed justifications can be classified as follows: (1) protection of the right of individuals to work without joining a union; (2) prevention of monopolies; (3) correction of abuses said to arise out of the union-shop relationship, such as arbitrary expulsions or refusals to admit; (4) prevention of strikes over union-security agreements; (5) prevention of unions' obtaining undue power under union-security agreements and consequently making unreasonable demands. The following portion of the brief will analyze the last three of such claimed justifications and demonstrate their inadequacy; the first two claimed justifications have been discussed and disposed of earlier in this brief (pp. 61-75).

1. Correction of Abuses.

The proponents of the anti-union-shop legislation assert that union-shop agreements may and do give rise to abuses by union parties to union-shop agreements, which abuses directly affect job rights, as, for instance, arbitrary expulsions from or refusals to admit into membership, or favoritism in supplying employees when called upon to do so under certain types of union-shop agreements, or other internal practices which may cause individuals, otherwise qualified, to lose employment opportunities. It is said that the prevention of such abuses are assuredly a legitimate object of state legislation.

To begin with, it is to be noted that the anti-union-shop laws of the States of Arizona, Nebraska and North Carolina are not directed at such abuses, but are applicable regardless of whether any such abuses do exist and regardless of whether unions within the State freely admit all qualified applicants to membership. Furthermore, no such abusive conditions do as a matter of fact exist in any of the three States, and no claim has been made that unions in these States function internally, under union-shop agreements, in a manner arbitrarily to deprive employees of job rights. In North Carolina, the uncontradicted testi-

mony discloses that "all organizations holding union-security agreements within the State freely admit all qualified applicants into membership" (No. 34, R. 18). The democratic procedures in respect to admissions and expulsions are testified to at length (No. 34, R. 18-20). In the Arizona and Nebraska cases the following allegation is made and admitted:

> "Membership in the plaintiff labor organizations, as well as all other labor organizations operating in the State, is open to all qualified persons, and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition to membership or the continuation thereof. All of such labor organizations welcome and admit to their ranks all persons in the respective lines of work who can meet the requirements as to skill prescribed by such organizations and who will submit to the reasonable discipline and by-laws of such unions and who are of good character and will agree to fulfill the contracts entered into by said unions." (No. 27, R. 16; No. 47, R. 7.)

It is asserted that while such abuses may not exist in these States, they do exist in other States and may come to exist in these particular States some time in the future. But this Court has held that legislative deprivation of rights and liberties protected under the Fourteenth Amendment cannot rest merely upon "fanciful conjecture" (*Borden's Farm Products v. Baldwin*, 283 U.S. 194) and cannot be "unsupported by anything of substance" (*Liggett v. Baldridge*, 278 U.S. 105). Surely, at least a tendency on the part of labor organizations within the State to thus abuse the union-shop relationship must appear before the State can attempt regulation, and even then, as will be demonstrated in a later portion of this brief, the State must deal with the abuses themselves rather than the institution under which the abuses may arise, unless it can be shown that such abuses are a necessary and inevitable result of the institution and can be dealt with in no way other than by abolishing the institution. Killing the patient

to cure a cold, or a possible future cold, has never been considered a reasonable method of approach. That the use of union-shop agreements does not inevitably result in closed unions or in practices of arbitrary admission and expulsion more closely corresponds to the available evidence than an opposite conclusion. As stated in the Law Review article attached hereto as Appendix E, p. 39:

> "While there have been instances of abuses of closed unions, there is no evidence to show that the closed union has been the inevitable result of union-security agreements or even closely associated with the agreements. There is, moreover, general evidence to show that workers are freely admitted to unions having union-security agreements in existence. In the first place, the objective of the union-security agreements, as has been frequently observed, is not to limit entrance into the union but rather to increase union membership. That the objective has been realized is shown by an examination of the progress unions have made since legislative sanction was generally given to union-security agreements. In 1933, there were approximately 3,000,000 union members. As a result of the various anti-injunction statutes and affirmative sanctions of the agreements, union membership had increased to approximately 15,000,000 in 1947. Further, it is established by various studies that what incidence there is of closed unions, it is less in times of prosperity and greater in periods of economic distress when unions may seek to protect the jobs of their members. The postwar period which presumably led to the passage of the statutory bans on union-security agreements was one of increasing prosperity in which jobs were so plentiful that unions could not supply all the workers required by employers. In many instances business managers hired whom they could. Some unions joined with business managers in apprentice training programs in order to increase the supply of trained workers. Finally, the growth of industrial unions as opposed to craft unions in recent years has operated to facilitate entrance to unions by workers of all classes within a plant."

2. Prevention of Strikes for Union-Security Agreements.

It is asserted by proponents of legislation outlawing union-security agreements that such legislation is justified on the ground that efforts to secure union-security agreements result in strikes and labor disturbances. Of course, on this premise any of the traditional objectives of labor organizations, such as shorter hours, or higher wages, could be proscribed; assuming the legitimacy of the objective, it could hardly be within the province of a State to outlaw such objective on the sole ground that the seeking of it might precipitate strikes or other industrial disturbances, at least where no adequate substitute for obtaining or realizing such objectives is provided. *Wolff Packing Company* case, *supra*. Any other view would nullify the entire right of self-organization—a right whose free exercise cannot be previously restrained or impaired in the absence of grave and immediate public danger. See *Thomas v. Collins* and earlier discussions herein.

Furthermore, all available economic data indicates that union-security agreements and efforts to obtain them do not cause industrial conflict to any degree. Of the 4900 work stoppages in 1946, only 2½% had for their sole object the obtaining of some form of union-security agreement. During that period 90% of all collective bargaining agreements were renewed without a strike, and this during the greatest strike wave in the nation's history. See Economic Brief, Appendix E, pp. 35-36; Economic Brief, p. 104. In only three of the twenty-nine major strikes of 1946 (which twenty-nine accounted for more than three-fourths of the total lost time) was union-security at issue at all, and in these three the union shop was only one of the issues. See Economic Brief, p. 104.

Far from the union-shop agreement in itself resulting in work stoppages, the available evidence indicates that union-shop agreements act as a preventative against or a solvent for such disturbances. See Economic Brief, pp. 46-53; Appendix E, thereof p. 35.

3. Prevention of Unions Becoming Overpowerful.

The final justification advanced for the outlawing of union-security agreements is the argument that such agreements make unions too powerful, that they cause them to make unreasonable demands, to engage in featherbedding practices, to restrict production, and the like. Of course, the immediate answer to this contention is that the real objection of those who assert this justification is to unionism itself, to the spread of organization, to the enlisting of all employees within a plant or within a trade or within an industry into one or more labor organizations. It is hardly within the province of a legislature to prejudge the reasonableness of demands, or to do other than leave the determination of such matters to collective bargaining between the parties. See discussion, p. 100, supra; Economic Brief, Appendix E, pp. 37-38.

In any event, the available evidence does not indicate that union-shop agreements in and of themselves inevitably give rise to the making of such arbitrary or unreasonable demands as to require their suppression. For instance, in respect to the charge of featherbedding, there is nothing to indicate that such practices are necessarily inherent in, or even a correlative incident of union-security agreements. On the contrary, common knowledge indicates that there is no such necessary connection. Thus, it is often asserted that the railroad unions engage in many featherbedding practices, and yet there are no closed-shop agreements in the railroad industry.

Further, far from union-security agreements resulting in any restriction of output or any interference with production, the weight of the evidence is overwhelming that the union-shop does not bring such results but, on the contrary, makes for higher efficiency and maximum productivity. See Economic Brief, pp. 106-108. One aspect of this was noted by Mr. Justice Jackson in his dissent in the *Wallace Corporation* case, 323 U.S. at p. 267:

"* * * a closed shop is the ultimate goal of most union endeavor and not a few employers have found it a stabilizer of labor relations by putting out of their shops men who were antagonistic to the dominant unions, thus ending strife for domination."

### D. Total Prohibition Rather Than Regulation Is Excessive and Arbitrary.

The discussion in the preceding section has indicated that, as a practical matter, there were no actual abuses or even abuses reasonably to be feared in the foreseeable future, which could serve as justification for the outlawing of union-security agreements in either the States of Arizona, Nebraska or North Carolina. However, even if it be assumed that abuses or abusive conditions of the type hereinbefore discussed are reasonably to be feared, and that protection against such possible future abuses is a legitimate function of the State in the exercise of its police power, nevertheless it is incumbent upon the State to deal with such possible abuses as such rather than to outlaw the institution or the activity out of which the abuses may arise, particularly where the activity or the institution itself is not inherently harmful but, on the contrary, serves many salutary, indeed indispensable, functions. There is possibly no industry, no activity, no occupation, which does not give rise to or afford opportunity for abuses; if the mere presence or possibility of such abuses afforded justification for proscription of the activity, few, if any, of our institutions would be safe from destruction by the State. Even if the matter of union-security involved only a question of contract-making power, it is clear that fraud, opportunities for abuse and actual abuse occur under all types of contractual relationships. Thus, for instance, overreaching is very possible under various types of insurance contracts, but it would hardly be proper for the State to deal with this possible abuse by prohibiting the making of all insurance contracts. As this Court stated in *Liggett v. Baldridge*, 278 U.S., at 113, "A State cannot under the guise of protecting the public, arbitrarily inter-

fere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"

In other cases this Court has indicated that where it is possible to secure a legitimate objective, without impairing essential rights or principles, or without imposing hardships in disproportion to possible benefits, the State must so proceed. *House v. Mayes*, 219 U.S. 270; see also *Tolliver v. Blizzard*, 143 Ky. 773, 137 S.W. 509.

It has not been argued, nor could it very well be argued, that each and every one of the claimed abusive conditions or other evils said to arise out of the union-shop relationship could not be reached by some method other than outright prohibition of the institution itself. Federal and state legislatures have already indicated at least three methods of controlling the relationship without destroying it. Some States regulate the mode of using union-security agreements, as by requiring authorization of a given percentage of employees as a condition to the execution of an agreement. See Economic Brief, Appendix E, p. 41, f.n. 179. Some States regulate the form of the agreement, as, for instance, the Taft-Hartley Act and the laws of Maine, which prohibit full closed-shop agreements but permit union-shop agreements. See Economic Brief, Appendix E, p. 42, f.n. 180. And some regulate the functioning of unions under union-shop agreements, as, for instance, by regulating admissions and expulsions. See Economic Brief, Appendix E, p. 42, f.n. 182-186. In Massachusetts, the State Labor Relations Act provides that a contract which makes union membership a condition of employment is legal but adds that if a union denies to any employee eligibility to full membership and voting rights, such contract shall not be applicable to him. The statute also provides that if discrimination in employment occurs as the result of application of a closed-shop agreement that an employee may have recourse to the State Labor Relations Board for a hearing, in addition to such remedies as may be available within

the union. (Chap. 150A, Section 4, subsection (6), Massachusetts State Labor Relations Act.)

In a number of cases this Court has indicated that an absolute prohibition, as opposed to regulation, of a particular activity or occupation was a denial of due process where it appeared that the taking was very great and the evil sought to be remedied was incommensurate, and that the evils could be avoided by legislation short of prohibition. In connection with the thesis advanced in this portion of the brief, the following language of the Court in *Adams v. Tanner*, 244 U.S. 590, at 594, is applicable, even though this Court may not agree with the ultimate holding in the case:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensive practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

That case involved a question of whether due process was infringed by an outright prohibition rather than a regulation of private employment agencies in the State of Washington. While the majority held that such prohibition was excessive, Mr. Justice Brandies, with whom Justice Holmes and Clarke concurred, dissented on the grounds that available economic material supported "a conviction that the evils of private agencies were inherent and ineradicable;" that these evils were very great and the problem confronting the people of Washington because

of the operations of private employment agencies "was far more comprehensive and fundamental than that of protecting workers applying to the private agencies." In his dissent, Mr. Justice Brandeis undertook a thorough survey of the nature of private employment agencies and problems which arose thereunder and found as a fact that the attendant evils were great and the institution of private employment agencies not a particularly useful or indispensable one.

With this approach and with the ultimate conclusion reached in Justice Brandeis' dissent we are in accord. Appellants do not contend that, merely because an activity or occupation is not inherently evil, it cannot be prohibited but must be regulated, or even that prohibition is inconsistent with due process where the same end result might conceivably be reached by regulation. Whether prohibition is reasonable depends upon a number of factors, the most important of which are, first, the nature of the subject matter being prohibited, and second, the nature of the evils which the State seeks to prevent. If, as in the present case, the activity in question is a fundamental one serving many salutary and indispensable purposes, the total prohibition of which would have adverse repercussions not only upon a large segment of the public, but also upon the entire economy of the State; and if, as in the present case, both the evils reasonably to be feared and the interests to be protected are slight or imaginary, then reasonable men could hardly differ on the proposition that prohibition would be excessive and arbitrary when regulation could accomplish the desired result.

A case similar in nature to *Adams v. Tanner, supra,* is *D. E. Weaver v. Palmer Brothers,* 270 U. S. 402. There, this Court found an absolute prohibition of the use of shoddy in the making of comforters to be arbitrary where regulation would have served the legislative purpose of eliminating a health hazard. Although Mr. Justice Holmes dissented along with Justices Brandeis and Stone, he

implied that, were not the evils great, and were it possible to distinguish the end products of good and bad manufacturing techniques, he might question the absolute prohibition. In *Cotting v. Godard*, 183 U.S. 79, this Court noted that "limitation is not the equivalent of confiscation."

The principle that total prohibition of an activity or occupation not *malum in se* is excessive where regulation would suffice is accepted not only by this Court but throughout the States. See Freund, "The Police Power," Sec. 62. See, in particular, *People v. Weiner*, 271 Ill. 74, 110 N.E. 870; *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451, 27 L.R.A. (N.S.) 528, 18 Ann. Cas. 474; *Marymont v. Nevada State Banking Board*, 33 Nev. 333, 111 Pac. 295, 32 L.R.A. (N.S.) 477, Ann. Cas. 1914A, 162. Indeed, at least two (North Carolina and Nebraska) of the three courts in the cases below have indicated strong agreement with the rule; in view of the forceable language in the following decisions, their reluctance or refusal even to comment on this particular argument, pressed both in brief and orally, is somewhat surprising. In *North Carolina v. Harris*, 216 N.C. 746, 6 S.E. (2d) 854, 128 A.L.R. 658, the North Carolina Supreme Court said:

> "Referring to industrial trades, it is said in the article on Constitutional Law, 11 Am. Jur. 1048: 'As to them, the power of regulation is comparatively slight, when they are conducted and carried on upon private property and private means.' In such cases the law-making body is usually relegated to restrictions more distinctly regulative rather than prohibitive. The principle justifying requirements of personal fitness as a condition for engaging in an occupation is a narrow exception to pertinent constitutional guaranties of personal liberty which cannot be enlarged beyond its proper scope without such violence to their purpose as would be subversive of the freedom which has been universally attributed to the American system.
>
> "*It follows that there is a well recognized gap between the regulation of a business or occupation and*

*restrictions preventing persons from engaging in them to which courts must pay careful attention.*

*"There is nothing in government more dangerous to liberty and rights of the individual than a too ready resort to the police power. It is a sufficient reference to history to recall that these restraints were the outcome of an appreciation of that fact, born of experience.* They are categorically addressed to that issue. They are the product of an individualistic age, and there is little room to doubt their intended scope and purpose as affecting decision in the instant case. Resort to the police power to exclude persons from an ordinary calling, finding justification only by the existence of a vague public interest, often amounting to no more than a doubtful social convenience, is *collectivistic in principle, destructive to the historic values of these guaranties, and contrary to the genius of the people who did all that was humanly possible to secure them in a written constitution.* We believe that they were intended to give to the individual a larger endowment of personal liberty than could be otherwise guaranteed; a greater opportunity for initiative, and the acquisition of those interests which make for responsible citizenship." (Emphasis supplied.)

In *Webber v. City of Scotsbluff*, 141 Neb. 363, 3 N.W. (2d) 635, the Nebraska Supreme Court stated:

"That the City of Scotsbluff had the power to enact an ordinance regulating auction sales is not questioned. This power is statutory. Comp. St. 1929, sec. 16-238. The question is not the lack of power to enact, but whether or not the enactment places *arbitrary and unreasonable restrictions* on the conduct of lawful business, whether or not it is class legislation, whether or not it is a *prohibition instead of a regulation*, whether or not it is in violation of the guaranties of the Constitution of Nebraska, and whether or not it is *violative of the Fourteenth Amendment to the Federal Constitution.* * * *

"The right to regulate auction sales is found in the police power, and the regulatory provisions of an

ordinance under the police power must have some relation to the public health, safety or welfare. . . . If they do not bear such relation they are void as an invasion of the property rights of persons affected by their enforcement. * * *

"*Assuming that these regulatory provisions do have some relation to public health, safety or welfare, it seems clear that they arbitrarily and unreasonably interfere with private business and impose unreasonable and unnecessary restrictions on auction sales and for that reason may not be upheld* * * *: In the sense of the approach by the City of Scotsbluff to auction sales, the ordinance here is in its essence in terms *restrictive rather than regulatory.*

"We conclude, therefore, that the provisions of the ordinance in question to which attention has been directed are *unreasonable and arbitrary,* that they are, as applied to the business of selling at auction, *restrictive rather than regulatory,* and that the entire ordinance creates an arbitrary, illegal and unreasonable classification. The ordinance is, therefore, in its entirety *unconstitutional and void.*" (Emphasis supplied.)

While it is true that the States have great discretion both in the choice of subjects of legislative regulation and in the means of accomplishing desired ends, still some restraint must exist if individual freedoms are to survive. The principle long ago expressed by Mr. Justice Holmes in the *Mahon case,* 260 U.S., at 414, that total prohibition might be excessive where "The extent of the public interest is shown by the statute to be limited * * * [and] on the other hand the extent of the taking is great" is a sound one; to follow it does not involve any real interference with legislative prerogatives, while, on the other hand, a degree of protection for individual liberties is thereby accorded as against ill-considered legislation sometimes resulting from the "clamor of an excited people" or from mass hysteria and passing public frenzies often all too easily induced by a hostile and undiscriminating press.

## E. Discriminatory Aspects of Prohibition.

### 1. In General.

Final evidence of the irrationality and unreasonableness of any outright prohibition on the making of union-security agreements, as well as of possible violations of the equal protection clause of the Fourteenth Amendment, is seen in the discriminations and inequities thereby produced. One result of discrimination has already been noted, namely, the fact that while, on the one hand, organized labor is deprived of its one consolidative technique, business managers are left with at least seven such techniques having direct relationship to their dealings with organized labor. See p. 91, *supra;* also Economic Brief, Appendix E. p. 29. Assuredly, the scales have been made to weigh heavily and unreasonably on the side of management as a result of depriving workers of the right to enter into union-security arrangements, and the ability of workers to compete with business managers in gaining an adequate share of the national income has been materially lessened.

Similarly, the ability of organized employees to compete with unorganized employees for fair wages has been reduced if not destroyed. Surely, the State has lent its weight and support to one class of competitor and against another in the economic struggle and competition between workers not only for jobs but for jobs which pay an adequate wage. It has sided with those workers who believe they can best bargain with their employer individually in majestic, if poverty-stricken, aloofness from their fellow workers, and against those workers who, heeding the lessons of the centuries, believe that "a single employee is helpless in dealing with an employer * * * and that union is essential to give laborers opportunity to deal on an equality with their employer." *(National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra.* It has thrown its weight on the side of the "free rider" who, though perfectly willing to accept all the benefits of collective bargaining achieved only through the struggle

and sacrifice of his fellow workers who are union members, is unwilling to contribute to the costs of such benefits."[18]

Since under any law outlawing the union-security principle the State can be interested only in benefiting a particular class of private persons, namely, non-unionists or those claiming an unqualified right to work without joining with their fellow workers in a labor organization, and not the public in general, the holding of this Court in *Treigle v. Acme Homestead Association*, 297 U.S. 189, is applicable. There, this Court held that legislation restricting rights protected under the Fourteenth Amendment or under the contract clause must be enacted for a purpose reasonably connected with protecting public interest as distinguished from a purpose of protecting purely private rights. In that case the State of Louisiana had attempted to alter contracts between building and loan associations and their members, by penalizing members withdrawing from the association for the benefit of those who remained. In deciding that the due process clause had been violated, this Court, in a unanimous opinion, stated as follows:

> " • • • We recognize that these associations, like banks and public service companies, are subject to a degree of regulation which would be unnecessary and unreasonable in the case of a purely private corporation. *But laws touching building and loan associations, like those affecting banks or utility companies, must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights.* The legislature has no greater power to interfere with the private contracts of such corporations,

[18] In *American Federation of Labor v. Watson, et al.*, 60 Fed. Supp. 1010 (later reversed by the United State Supreme Court in 327 U.S. 582), a Florida three-judge District Court attempted to answer the "free rider" argument and its obvious analogy to the requirement that all in a community pay taxes to support the community by asserting that under our tax system there are also many "free riders." Such an answer overlooks the obvious fact that taxes are required of all who, like employees receiving wages achieved through collective bargaining, have an ability to pay and are particularly required of those obtaining special benefits.

or the vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in the case of a private corporation. *Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.*

"As we have pointed out, the questioned sections deal only with private rights, and are not adapted to the legitimate end of conserving or equitably administering the assets in the interest of *all members.* They deprive withdrawing members of a solvent association of existing contract rights, *for the benefit of those who remain.* We hold the challenged provisions impair the obligation of the appellant's contract and arbitrarily deprive him of vested property rights without due process of law." (297 U.S. at 197.) (Emphasis supplied.)

There is also involved in these laws, over and above the foregoing inequities, a particularly insidious form of confiscation. Under federal law labor organizations which represent a majority of the employees in an appropriate bargaining unit are under obligation to represent equally all employees in the bargaining unit. *Steele v. Louisville & Nashville Ry. Co., supra.* Such an organization has imposed upon it the duty of extending its services impartially to all who comprise the industrial society for which it speaks and acts. But the costs of industrial self-government, like the costs of political government, are not small. The costs to the labor organization of obtaining wage increases and other improvements of working conditions, the expense of servicing an agreement already entered into, of adjusting grievances, of maintaining stewards and business representatives, are considerable, and the process of collective bargaining itself involves financial outlay, as, for instance, the hiring of economists for research work, the hiring of lawyers for legal advice, and the paying of com-

pensation for the loss of time occasioned to employees acting as bargaining committees. Yet unions are denied the right to seek, through closed-shop agreements, to require all who benefit from collective action to contribute to the costs thereof.

The implications of the Steele case denote another species of discrimination. It can truthfully be said that by virtue of their obligation to serve equally all within the bargaining unit, federal law has imposed upon labor organizations obligations akin to those of governmental bodies, public utilities or common carriers. It could hardly be asserted that a law requiring utilities or common carriers to extend their services to some customers on gratuitous basis, while requiring the remaining and similarly situated customers to carry all of the costs of maintaining the service, would be constitutional. Wherever comparable attempts have been made, the courts have promptly struck them down as unconstitutional. Numerous cases on this point are set forth in the footnote to the general rule stated in 43 *American Jurisprudence* 683 to be as follows:

> "As a general rule a public utility cannot discriminate unjustly in its rates to consumers similarly situated or of the same class for the same service or kind of service."

See, in particular, *Cotting v. Godard,* 183 U.S., at p. 86, wherein it is stated as follows:

> "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking

of private property for public use without just compensation or without due process of law.'"

See also *Louisville & Nashville R.R. Co. v. Railroad Commission*, 19 Fed. 679, where it was held that a statute giving a railroad commission the power, for undisclosed reason and without accountability to anyone, to give better rates to one corporation than another was unconstitutional. And see *Salisbury & Spencer R.R. Co. v. Southern Power Co.*, 179 N. C. 18, 101 S.E. 593, 12 A.L.R. 304, where it was held that an electric power utility cannot discriminate in charge or service between the several members of the class desiring or utilizing its service.

2. Particular Discrimination in Respect to the Arizona Enactment.

The Arizona amendment requires special consideration in respect to the question of whether the equal protection of the laws clause of the Fourteenth Amendment is or is not violated. The Arizona law, unlike the laws of Nebraska and North Carolina, or of any of the other States which have outlawed union-security agreements, forbids denial of employment only by reasons of *non*-membership in a labor organization. Thus, while under the Nebraska and North Carolina laws, an employer is not free to refuse to hire or to discharge because of an employee's membership in a labor organization, in Arizona the employer is free to refuse to hire or discharge an employee because he is a union member. If, indeed, it is the right to work which it is the purpose of the State to protect, and even if we assume that the right to work as a non-unionist is correlative with the right to work as a unionist and is a proper subject matter of legislative protection, on what theory is protection of the right to work to be extended only to non-unionists and withdrawn from employees who are members of labor

organizations? In the face of the long and shameful history of employer interference with the right of self-organization through discharge of union members—a history so notorious as to give rise to the passage of the National Labor Relation Act. *(N.L.R.B. v. Jones & Laughlin Steel Corp., supra)*, can it very well be asserted that abuses or evils of job discrimination occur only in respect to non-union members? Obviously not. Neither can it reasonably be said that the evil sought to be cured is most prevalent in respect to non-union employees. Surely, it is the rankest sort of discrimination to deny union members protection against discharges occasioned by reason of their union membership, while affording a protection for non-union members against discharge because of lack of union membership.

It is argued that two sections of Arizona laws passed in previous years affords protection to union members, and therefore the State need only legislate in respect to non-union employees. The sections referred to are 43-1608 and 56-120, A.C.A. 1939.

Section 43-1608 provides:

> *"Coercing persons not to join labor organizations.*—Any person who shall coerce or compel any other person to enter into an agreement, either written or verbal, not to join or become a member of any labor organization, as a condition of such other person securing employment or continuing in the employment of any such person shall be guilty of a misdemeanor."

Section 56-120:

> *"Coercive contracts void.*—Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in either:
>
> (1) A contract or agreement of hiring or employment between any employer and any employee or prospective employee, whereby (a) either party to

such contract or agreement undertakes or promises not to join, become or remain, a member of any labor organization or of any organization of employers, or (b) either party to such contract or agreement undertakes or promises that he will withdraw from the employment relation in the event that he joins, becomes or remains, a member of any labor organization or of any organization of employers;

"* * * is hereby declared to be contrary to public policy and wholly void and shall not afford any bases for the granting of legal or equitable relief by any court."

It is apparent that both of the above sections apply only to contracts of employment between the employer and individual employees, and both appear to be for the purpose of preventing the execution of the so-called "yellow dog" agreement. Neither section makes it unlawful for the employer to deny employment to a union man or to discharge him upon the ground that he is a member of the union. The sections are limited in operation to the execution of contracts whereby the individual employee agrees not to remain or become a member of a labor organization. While the employer would have no right to enter into the contracts condemned, he would have the undoubted right to refuse to hire a union man, and the right to discharge him upon the ground that he was a member of the union.

The Supreme Court of Arizona, in considering the above statutes in the present case, did not construe them otherwise and did not construe such sections to outlaw discrimination against union members in respect to hire and fire, such as, for instance, was accomplished under Section 8 (3) of the Wagner Act; to the extent that there might be any contrary implication, this Court is not bound as against the plain language of the sections themselves. See *Venice v. Murdock*, 92 U.S. 494. All that the Arizona Court did hold was that it was not "necessary for the people to have encompassed in one constitutional amendment a corrective

for all evils which may or do arise in the field of employer-employee relations" (No. 27, R. 121). This, of course, is no answer to the argument that persons similarly situated within the general purview of the legislation have not been similarly treated and that thereby the equal protection guaranteed under the Fourteenth Amendment has been denied. *Lawton v. Steele*, 152 U.S. 133; *Frost v. Corporation Commission*, 278 U.S. 515; *Southern Railway Co. v Green*, 216 U.S. 400.

The discussion under Section III of this brief indicates at a minimum the following:

Since the absolute prohibitions against the making of union-security agreements are demonstrably arbitrary and discriminatory, since no real public interest is in fact thereby served but only the interests of a private few, and since the extent of the deprivation is entirely incommensurate with the evils reasonably to be feared and such evils could readily have been reached by regulation rather than prohibition, the anti-union-security laws in question violate the Fourteenth Amendment and must be stricken down even though rights of a less fundamental nature than those discussed in Section II are here involved. *Nebbia v. New York, supra; Treigle v. Acme Homestead, supra; Adams v. Tanner, supra.* There is simply no rational basis in the protection of any public, as distinguished from private, interest for the total prohibitions here imposed; if the justifications advanced are deemed sufficient, then there is no traditional activity or institution in our society which similarly cannot be proscribed. The Constitution contemplates that State interference with individual liberties be kept at a minimum. While organized labor is the first to appreciate the need for social experimentation by the State, such need cannot justify a wanton destruction of deeply-rooted institutions at any time the police power is ostensibly invoked.

## CONCLUSION

Few cases since *Thornhill's* have had implications affecting the American labor movement as deeply as the cases at bar. These cases will determine the extent of state prerogative not only to remove traditional subject matters from the field of collective bargaining, but also to proscribe, unconditionally, an institution coeval with trade unionism itself and without which institution, absent factors of state protection, organized labor must inevitably disintegrate into debility. The prohibitions of the three enactments herein involve far more than the regulation of labor unions which this Court indicated was permissive in the *Thomas* case; rather they trespass upon, in a very real and practical manner, the domains set apart for free assembly as exercised by workingmen in the conduct of their everyday affairs. It is respectfully urged, upon the authorities and arguments presented above, that this Court declare the anti-union-security prohibitions of the States of Arizona, Nebraska and North Carolina invalid as contravening the federal Constitution.

Respectfully submitted,

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